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A TREATISE

ON THE LAW OF

DOMESTIC RELATIONS

BY

W. C. RODGERS

COUNSELLOR AT LAW

CHICAGO

T. H. FLOOD AND COMPANY

1899

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TO THE
HONORABLE R. B. WILLIAMS,
OF
TEXARKANA, ARKANSAS,
A LAWYER

WHO ENTERTAINS THE HIGHEST VIEWS OF LEGAL ETHICS; WHO IS
ALWAYS ACTIVE IN PROMOTING THE ELEVATION AND USEFUL-
NESS OF THE BAR; A MAN OF HIGH IDEALS OF JUSTICE; A
FAIR AND COURTEOUS, BUT FORMIDABLE, OPPONENT;
A JURIST WITHOUT BLEMISH; AN EXEMPLARY
CITIZEN AND CHRISTIAN GENTLEMAN,
THIS VOLUME IS INSCRIBED
AS A
TOKEN OF THE HIGH ESTEEM IN WHICH HE IS HELD
BY THE AUTHOR.

PREFACE.

It has been the purpose of the author to prepare a treatise on the subject chosen, and sub-titles, reflecting the living law. Usefulness, fullness, accuracy, completeness has been aimed at. The work is as extensive as could be well embraced in one volume. The authorities are brought down to date. The most important statutory changes in the common law have been noticed and treated. The old law has not been overlooked, but has been brought down to date. Copious citations have been made. The book has been written with a view to practical utility and reliability. It has been attempted to state the propositions of law correctly, and to fortify these with authority. The work has been written in the midst of an active practice, and every line composed and written by the author. No "clerks" or "assistants" have contributed to the work. It has been the purpose to treat the subject with a view to the law as it is to-day, and as it comes up in every-day practice.

W. O. RODGERS.

NASHVILLE, ARK., May, 1899.

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DOMESTIC RELATIONS.

CHAPTER I.

MARRIAGE.

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|---|---|
| <p>§ 1. Definition.</p> <p>2. Nature and importance of relation.</p> <p>3. Is a civil contract.</p> <p>4. Peculiarity of the contract.</p> <p>5. Civil status of the state of marriage.</p> <p>6, 9-13. Age of consent.</p> <p>7, 8. Consent of parents.</p> <p>14-16. Physical incapacity.</p> <p>17-23. Mental incapacity.</p> <p>29-43. Bigamous marriages.</p> <p>44-47. Duress.</p> <p>48-58. Fraud.</p> <p>59-66. Capacity of slaves to contract marriage.</p> <p>67-73. Indian marriages.</p> <p>74-78. Marriages between negroes and whites.</p> <p>76. Miscegenation.</p> <p>79, 80. Who may officiate at marriages.</p> <p>81, 82. Effect of unlawful act in officiating.</p> <p>83-91. Common-law marriages.</p> <p>83. Requisites under decrees of Council of Trent.</p> <p>87. Marriages <i>per verba de presenti</i>.</p> <p>88. Marriages <i>per verba de futuro cum copula</i>.</p> <p>89. General rule as to validity of, in America.</p> <p>92. Gretna Green marriages.</p> <p>93-95, 105, 110. Proof of marriage.</p> <p>95. Proof required in criminal cases.</p> | <p>§§ 93, 100, 106. Presumptions as to validity.</p> <p>101. When presumption of validity overcome.</p> <p>96-98. Cohabitation.</p> <p>102. Presumption that married persons are alive until contrary appears.</p> <p>103. Death of one of the parties presumed, when.</p> <p>99. Illicit intercourse not marriage.</p> <p>111-116. Rule of <i>lex loci contractus</i> and conflict of laws.</p> <p>119. Presumptions as to foreign laws.</p> <p>117. Domicile of married persons.</p> <p>120-129. Incestuous marriages.</p> <p>123. Curative acts with reference to incestuous marriages.</p> <p>128. Marriages contrary to nature.</p> <p>129. Marriage under mistake of fact.</p> <p>130. Effect of marriage on nationality of the parties.</p> <p>131, 132. Decree of divorce, effect of.</p> <p>133. Void and voidable marriages.</p> <p>134. When party estopped to deny validity of.</p> <p>135. Consideration of marriage.</p> <p>136. Marriages indissoluble.</p> <p>137. Conviction of felony.</p> <p>138. Legislative regulation of.</p> <p>139. Consent of parties imperative.</p> <p>140. Marriage in jest.</p> <p>141-146. Impotency an impediment.</p> |
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§ 1. Definition of the term.—Worcester defines the term “marriage” to be “the act of marrying or uniting a man and woman for life as husband and wife; the state of legal union between a man and woman; matrimony; wedlock.”¹ Bouvier defines it thus: “A contract, made in due form of law, by which a man and woman reciprocally agree to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife.”² It has been said judicially that “marriage is a mutual agreement of man and woman to live together in the relation and under the duties of husband and wife, sharing each other’s fate or fortune for weal or woe until parted by death.”³

§ 2. Nature and importance of the relation.—This state of man has existed in all ages from the earliest times. In a sense, it is a consummation of the Divine command to “multiply and replenish the earth.” It is the state of existence ordained by the Creator, who has fashioned man and woman expressly for the society and enjoyment incident to mutual companionship. This Divine plan is supported and prompted by the natural instinct, as it were, on the part of both for the society of each other. It is the highest state of existence in the most polished condition of man. All living creatures are made male and female; but it is for man only to live in a state of matrimony, and for him alone to guard and perpetuate marriage as practiced and sanctioned by all civilized people from the earliest times. The lower animals know nothing of the state, and it only exists imperfectly in savage life. All writers, all critics, all theologians, all philosophers, all scientists, all civilized mankind, in a unified voice proclaim it the only stable substructure of our social, civil and religious institutions. Religion, government, morals, progress, enlightened learning and domestic happiness must all fall into most certain and inevitable decay when the married state ceases to be recognized or respected. Accordingly, we have in this state of man and woman the most essential foundation of religion, social purity and domestic happiness. Indeed, its gigantic importance is only realized upon the most mature and thoughtful reflection.

¹ Worcester’s Dict., “Marriage.”

² Lewis v. Amis, 44 Tex. 819, 841.

³ Bouvier’s Law Dict., “Marriage.”

§ 3. Considered from a contractual standpoint.— Marriage in this country, while it is attended usually with more or less religious ceremony, and while it is sanctioned by God and regarded as especially sacred in its nature and requirements, is nevertheless usually regarded in law as simply a civil contract.¹

§ 4. Difference in contracts of marriage and other contracts.— It is well known that, in many respects, a contract of marriage differs from an ordinary contract; yet it is chiefly in the fact, first, that it is indissoluble in its binding force, even with the consent of the parties or either of them; and second, because it creates a status which follows and attends the parties all through life, enjoins certain burdens and privileges towards the world as well as toward each other and the offspring of the union. In its far-reaching nature the contract of marriage is of most vital importance. By virtue thereof the duty of caring for and protecting the children, as well as all the duties and liabilities arising by operation of law, are enjoined upon the parties; and this duty is not for an hour or a day, but for life itself. It can never be fully performed so long as the parties live. Nor can it be shunned or avoided by either. In the case of marriage, death, in a sense at least, sunders the

¹Keyes v. Keyes, 22 N. H. 553; Turner v. Turner, 1 Hag. Con. 414; Territory v. Corbett, 3 Mont. 50, 55; Jones v. Jones, 28 Ark. 19; Bailey v. State, 36 Neb. 808, 55 N. W. Rep. 241; Clayton v. Wardell, 4 N. Y. 230; Dalrymple v. Dalrymple, 2 Hag. Con. 54; Maryland v. Baldwin, 112 U. S. 490, 5 Sup. Ct. Rep. 278; Goodrich v. Cushman, 34 Neb. 460, 51 N. W. Rep. 1041; Gibson v. Gibson, 24 Neb. 434, 39 N. W. Rep. 450; 4 Bl. Comm. 432; Odd Fellows Benefit Ass'n v. Carpenter (R. L.), 24 Atl. Rep. 578; Mathews v. Phoenix Iron Foundry, 20 Fed. Rep. 281; Williams v. Williams, 46 Wis. 464, 1 N. W. Rep. 98; 2 Greenl. Ev., § 460; Cartwright v. McGown, 121 Ill. 388, 12 N. E. Rep. 737; Sharon v. Sharon, 75 Cal. 1, 16 Pac. Rep. 345; State v. Bittick, 103 Mo. 183, 15 S. W. Rep. 825; Voorhees v. Voorhees, 46 N. J. Eq. 411, 19 Atl. Rep. 172; Ridgely v. Ridgely, 79 Md. 298, 29 Atl. Rep. 597; Simon v. State, 31 Tex. Civ. App. 186, 20 S. W. Rep. 399; Holder v. State (Tex. Civ. App.), 29 S. W. Rep. 793; McCreary v. Davis (S. C.), 22 S. E. Rep. 178; Sapp v. Newsom, 27 Tex. 540; In re Strauss' Estate, 168 Pa. St. 561, 32 Atl. Rep. 98; Lutenbacher v. Lascher, 37 La. Ann. 831; Baker v. Baker, 13 Cal. 87; Londonnery v. Chester, 2 N. H. 268; Hantz v. Sealy, 6 Bin. (Pa.) 405; Lewis v. Amis, 44 Tex. 319; Rice v. Rice, 31 Tex. 174; Dumarsley v. Fishley, 3 A. K. Marsh. (Ky.) 377; Cunningham v. Burdell, 4 Bradf. 343; State v. Harris, 63 N. C. 1; Clark v. Clark, 10 N. H. 380; Bissell v. Bissell, 55 Barb. 325; Parker's Appeal, 44 Pa. St. 309; Ferlat v. Gojon, 1 Hopk. Ch. 478, 493.

contract, for its implied nature only extends to the parties while living; while in other contracts, in many kinds at least, death does not terminate it. All the rights, privileges and duties of the relation flow from and take their inception at the making of the marriage contract, and none of these can exist except by virtue of this civil undertaking and contract. "The holiness of the matrimonial state," says Blackstone, "is left entirely to the ecclesiastical law, the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. . . . And, taking it in this civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all cases where the parties, at the time of making it, were willing to contract; able to contract; and, lastly, did contract, in the proper forms and solemnities required by law."¹

§ 5. **Civil status of.**—In Mississippi, the generally accepted theory that marriage is a civil contract does not obtain. It is there held that it is "a civil status, a matter *publici juris*, created by public law, subject to the public will, and not that of the parties who cannot dissolve it by mutual consent."² But this statement of the law is not strictly correct. To say that marriage is a civil status, created by public law and subject alone to the public will, is stating the rule too broadly. No marriage can exist without the will of the parties, nor can it exist by the will of the public law alone. Like all other contracts, this results in a duty of both parties to themselves and each other as well as to the public; but this is true in some degree of all contracts. It is not the public law, but the contract itself, that must be looked to in determining the status of parties in the married state, just as the contract is the substructure and groundwork of any other civil agreement. The effect of a marriage contract is thus well stated by the Wisconsin supreme court: "Marriage is not only a contract, but, when consummated, creates the most peculiar and solemn of all domestic relations. It comes into existence in pursuance of a contract, but, when formed, it involves rights and duties flowing from a source transcendentally above any and all con-

¹ 1 Bl. Comm. 433.

² Carson v. Carson, 40 Miss. 351; Magee v. Young, 40 Miss. 114.

tracts which the parties are capable of making. It is akin to the tender relation between parent and child, and has a peculiar sanctity not to be expressed in any commercial phraseology like the word 'contract.' Its obligations can be enforced in ways unknown to the laws of contracts. It is shielded from unholy intrusion by severe penalties enacted in laws both human and Divine. It unites two persons in life by giving to each a new status before the law as to society, each other, and the property of each. This status not only involves the well-being of the parties thus united, but the good of society and the state. The marriage status of the husband involves not only his allegiance and fidelity to his wife, but an obligation to support and a surrender to her of a certain inchoate interest in his lands. So the marriage status of the wife involves, not only her allegiance and fidelity to her husband, but a condition of security in respect to her future support and an inchoate interest in his lands, and especially his homestead. The marriage status of each involves the care, custody, education and control of the children of such marriage."¹ This is all well said; and does not necessarily militate against the idea that marriage is a civil contract. But in either event, the civil duties, liabilities and responsibilities are the same.²

§ 6. Age of consent.— There are at least three things which the law requires to exist as conditions precedent to a valid marriage agreement: First, the parties must be willing to marry; second, able to marry; and third, must actually enter into the contract by mutual consent. By the common law no persons were capable of entering into the married state except such as had attained the age of fourteen years, if a male, and twelve years, if a female. At and after these respective ages the parties, so far as any impediment on account of age was concerned, were fully capable of consummating the contract and assuming to each other and to the world the duties of husband and wife. The reason the common law has fixed the ages of the respective sexes thus is, it is the average time at which physical development from a sexual standpoint takes place. The exact

¹ Cook v. Cook, 56 Wis. 195, 14 N. W. Rep. 33, 443; Smith v. Smith, 1 5 Pac. Rep. 693. Gray (Mass.), 209.

² In re Estate of Higbee, 4 Utah, 19,

age of puberty varies slightly with individuals and in different climates; but these ages are as near correct, as a general rule, as can be fixed. Until this age is attained, the physical development is not such that procreation, one of the important objects and purposes of matrimony, can take place.¹

§ 7. Age of consent — Consent of parents, necessity for.— By the common law, where the parties had arrived at the ages of fourteen and twelve, respectively, no consent of parents was necessary to lend validity to the marriage. This is always the rule where the common law on the question has not been invaded by statutory enactment.² And it is true even where the marriage is celebrated by a clergyman or civil officer in violation of law without such consent.³ But by sundry statutes in England this rule has been modified to the extent of imposing certain fines and penalties upon clergymen who celebrate the nuptials between minors under certain ages without license, which could be procured only by and with the consent of the parents, or by the publication of banns which supplied and implied such consent.⁴ The aim of the English law was to put a stop to clandestine marriages and render more certain the proof of legitimacy. And when marriages were celebrated in the parish church, there could be little difficulty from this source. But marriages by license had to be celebrated with the consent of the parents or guardians.⁵

§ 8. Statutory requirements as to consent of parents of infants — Effect of celebration without such consent.— The statutes of the several states usually require that the consent of the parents of an infant be had before the marriage of such minor may be solemnized. But these statutes, unless expressly providing that the marriage shall be void in event of a failure to comply with their requirements, are generally construed as directory only. And a marriage celebrated by a minister or

¹ Parton v. Hervey, 1 Gray (Mass.), 119, 121; 1 Bl. Comm. 436; 2 Kent, Comm. 78; Co. Litt. 79a; Hiram v. Pierce, 45 Me. 367; Governor v. Recorder, 10 Humph. (Tenn.) 57, 61.

² Hiram v. Pierce, 45 Me. 367; 1 Bl. Comm. 437.

³ Parton v. Hervey, 1 Gray (Mass.), 119.

⁴ Harford v. Morris, 2 Hag. Con. 423; 1 Bl. Comm. 437.

⁵ Harford v. Morris, 2 Hag. Con. 423; Rex v. Birmingham, 8 Bar. & Cr. 28.

other officer, regardless of such requirements, will be valid, although by the act the minister or other officer, by so celebrating the marriage, subjects himself to heavy penalties under the criminal laws.¹ This rule, of course, applies only where the parties have arrived at the age of consent. If they have not reached this age, they are not capable of agreeing to a valid marriage contract.² And where the common-law rule as to the age of consent is invaded by a state statute, the rules of law by which marriages are to be governed generally are not thereby changed. It is simply to raise or lower, as the case may be, the age of consent. The change does not make the consent of parents or any other formality necessary which would not have been necessary but for the change. The fact that the father will lose the services of his daughter which at common law he is entitled to until she arrives at the age of twenty-one years, by marrying without his consent, will not affect the validity of a marriage entered into after arriving at the required age, whether the common-law rule as to age of consent be changed or not. The right of the infant to contract marriage is paramount to the duty of the infant as a servant of the parent.³ But the child cannot emancipate itself by marrying before arriving at the age fixed by law at which a valid marriage could be contracted, whether the common-law age of consent be changed by statute or not.⁴

§ 9. Common-law rule of age of consent — Statutory changes and requirements.— The age of consent, as laid down at common law, has generally been changed in this country, usually to fourteen in females and seventeen in males, though the changes have not been uniform. A statute providing that males of the age of eighteen, and females of the age of fifteen, shall be capable in law of contracting marriage, has been held to change the common-law rule so that those under these ages are not competent to contract matrimony.⁵ But a statute which

¹ *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 S. Rep. 837; *Askew v. Dupree*, 30 Ga. 173; *Milford v. Worcester*, 7 Mass. 48.

² *Parton v. Harvey*, 1 Gray (Mass.), 119.

³ *Governor, use of Smith, v. Rector*,

10 *Humph. (Tenn.)* 57; *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63; *Koonce v. Wallace*, 7 Jones (N. C.), 194; *Fisher v. Bernard*, 65 Vt. 663, 27 Atl. Rep. 316; *Holtz v. Dick*, 42 Ohio St. 23.

⁴ *Lyndon v. Lyndon*, 69 Ill. 43.

⁵ *Beggs v. State*, 55 Ala. 108; *Good-*

merely fixes the age at which a female may consent to carnal abuse does not change the common-law rule as to age of consent with reference to contracts of marriage. And though a girl could not consent to carnal abuse, from a criminal standpoint, she is yet competent to marry if she has arrived at the common-law age of twelve years.¹ In Michigan it is provided by statute that "in case of a marriage solemnized when either of the parties was under the age of legal consent, if they shall separate during such non-age, and not cohabit together thereafter, the marriage shall be deemed void without any decree of divorce or other legal process." Under this statute the party who has attained the required age is bound by the contract unless both separate by mutual consent before the youngest reaches the lawful age, or unless such younger party, on arriving at age, refuses to recognize the marriage.²

§ 10. Age of consent — Non-age, disabilities of.—It has always been held that an infant who has contracted marriage before arriving at the age at which the law permits him to make such a contract may disaffirm it and treat it as absolutely void and of no force, and he can do this even without a sentence of a court pronouncing the marriage void for want of lawful age.³ But if the parties, or either of them, after arriving at lawful age, once give consent, it cannot be thereafter revoked by such party; and if both give such consent after arriving at such age, it cannot be afterwards revoked by either.⁴ At one time it was supposed that if a man of lawful age marry one under such age, he, as well as she, might, at their option, disaffirm the contract upon the female arriving at the age of consent, "because in contracts of matrimony both must be bound

win v. Thompson, 2 Greene (Iowa), 329; Wis. R. S., § 2350; Elliott v. Elliott, 77 Wis. 634, 46 N. W. Rep. 806. But under this law the Wisconsin court holds marriages before reaching the statutory age voidable merely, and not void until so pronounced by a court of competent jurisdiction; and a marriage where the parties had not reached the statutory age, not annulled by any court, is sufficient to ground a conviction of bigamy upon

upon. State v. Cone, 86 Wis. 498, 57 N. W. Rep. 50.

¹ Fisher v. Bernard, 65 Vt. 663, 27 Atl. Rep. 316.

² People v. Slack, 15 Mich. 193.

³ Holt v. Clairencieux, 2 Str. 937; People v. Slack, 15 Mich. 193; Co. Litt. 79; 1 Bl. Comm. 436; People v. Bennett, 39 Mich. 208; Peter v. Roff, 8 Johns. Ch. 49.

⁴ Co. Litt. 79; Holtz v. Dick, 42 Ohio St. 23.

or equal election of disagreement given to both.”¹ But this rule cannot be regarded as sound law at the present time, if it ever should have been so regarded. There are many objections to it. In the first place, it places it in the power of one who is presumed in law to be old enough to make contracts, to impose on those who, by reason of their tender years, are not competent to contract. The party who can make a contract is in no favorable attitude to say that an agreement that he has solemnly entered into is not binding on him, because, forsooth, it may not be on the other, whom it is necessary for the law to protect from imposition by withholding the power to contract. There can be nothing lacking in such a contract but for the infant, upon arriving at the proper age, to ratify it. By far the better rule, and really the only proper one, is that only the party who, at the time of entering into the contract, was laboring under the disability of non-age, can renounce the same. As to the other party it is absolutely binding.² “The person of full age,” says Chancellor Kent, “is absolutely bound, and the contract is only voidable at the election of the infant.”³

§ 11. Age of consent — Estoppel.—The law is jealous in protecting those who, by reason of a lack of proper understanding, are not to be bound by their contracts. And so firmly is this doctrine adhered to, that it will not hold one under the age fixed by law for contracting marriage bound to carry out an agreement to marry made while under such age. And this is even true though the marriage be brought about by his false assurances that he was of proper age, and the other party was thereby misled to enter into the contract.⁴ “The incapacity of an infant is his privilege, and is intended for his advantage, to protect him from those impositions to which, from his inexperience, he is peculiarly liable.” And this general rule, subject to such recognized exceptions as liability for actual necessities, is firmly fixed in our jurisprudence.⁵ As the immunity of the infant is intended as a protection in all cases, he

¹ Co. Litt. 235a; 1 Bl. Comm. 436.

² 2 Kent, Comm. 78.

³ Holt v. Clairencieux, 2 Str. 937;

Elliott v. Elliott, 81 Wis. 295, 51 N. W. Rep. 81.

W. Rep. 81; Pool v. Prat, 1 D. Chip.

252.

⁴ Elliott v. Elliott, 81 Wis. 285, 51 N. W. Rep. 81.

⁵ Pool v. Prat, 1 D. Chip. 252.

cannot be sued for the breach of a contract of marriage. The law would serve but a feeble purpose in enabling him to repudiate his contracts at pleasure if he were to be subjected to an action for civil damages notwithstanding.¹ Nor does the fact that the infant may sue on his contract change the rule.² And when one under the legal age elects to disaffirm the marriage contract upon arriving at such age, this election governs his property rights and general status with reference to such marriage in all jurisdictions.³

§ 12. Age of consent — Ratification.—If the parties are under the age of consent when the contract is entered into, the marriage will nevertheless be valid if, after arriving at the lawful age, they continue to live together as husband and wife; for this would amount to a ratification and sustain the marriage, upon the principle that a ratification is tantamount to the making of the contract itself.⁴ At common law, if the parties to a marriage contract had reached the age of consent, nothing further was required to constitute a valid marriage except to enter into the agreement by mutual consent, and this is in accordance with the canon law.⁵ And where a statute provided that the marriage of males under seventeen should be void, this will not prevent the ratification of the contract after arriving

¹ *Hunt v. Peake*, 5 Cowen, 475; *Holt v. Clairencieux*, 2 Str. 937.

² *Holt v. Clairencieux*, 2 Str. 937; *Hunt v. Peake*, 5 Cowen, 475.

³ *McDeed v. McDeed*, 67 Ill. 545. In this case, however, while it seems clear that the marriage was entered into in Ohio, it does not appear whether the disaffirmance was in Illinois or Ohio, or whether the ages at which infants might repudiate the contract are the same in both states. If the age, being eighteen in Ohio, be greater or less in Illinois, a difficult question might arise as to which law as to the age should govern. If under the Illinois law the contract could not be disaffirmed after sixteen years of age, it would seem reasonable that the party could not renounce the agreement after becom-

ing a citizen of Illinois, though he would not have arrived at the age of eighteen. If, by the laws of Illinois, the contract might be repudiated upon arriving at twenty-one, it would seem from the same reasoning that the contract might be ignored, though the party be more than eighteen. When a person leaves his state and takes up his abode in another, he likewise leaves all the laws of such state and ends his allegiance thereto. By the same act he comes under the laws of his adopted state, and from that time owes allegiance to the new laws.

⁴ *State v. Parker*, 106 N. C. 711, 11 S. E. Rep. 517; *Co. Litt.* 79; 1 BL Comm. 436; *Smith v. Smith*, 84 Ga. 440.

⁵ 1 BL Comm. 437.

at such age, as the ratification, after the disability of non-age is removed, is sufficient.¹

§ 13. Age of consent — Reason of the rule.— It would seem, at first blush, that the law should be more jealous of the marriage contracts of infants than of other contracts; that a contract of such gravity, solemnity and awful consequences should be tolerated between children of tender years would be to their material detriment. And these considerations, perhaps, have doubtless brought about the modified condition of the common law on this subject which now generally prevails in the United States. But, aside from this, there was forcible reasoning to sustain the rule of the common law on the subject; such, indeed, as seemed necessary for the welfare of society in general rather than the individual in particular. The interest of the public and of society in maintaining legitimacy, and the necessity for the indissolubleness of the contract, together with many other reasons, have prompted the adoption of these principles. Not because it is proper to hold any one to a disastrous contract of this nature, but for the welfare of the state at large, which must be considered as paramount to the fate of any particular individual. In the eye of the law the evils arising from a looseness such as would permit these marriages to be dissolved at pleasure are considered greater than those which must flow from the law as it stands. And in choosing between two evils the lesser is adopted.²

§ 14. Physical incapacity.— Another condition which prevents the parties entering into the marriage relation is the

¹Smith v. Smith, 84 Ga. 440, 11 S. E. Rep. 496; Koonce v. Wallace, 7 Jones (N. C.), 195.

²Parton v. Hervey, 1 Gray (Mass.), 119. The learned court in this case, at page 121, thus lays down the reason of the law: "In regulating the intercourse of the sexes, by giving its highest sanctions to the contract of marriage and rendering it, as far as possible, inviolable, the law looks beyond the welfare of the individual as a class to the general interests of society, and seeks, in the

exercise of a wise and sound policy, to chasten and refine this intercourse, and to guard against the manifold evils which result from illicit cohabitation. With this view, in order to prevent fraudulent marriages, seduction and illegitimacy, the common law has fixed that period in life when the sexual passions are usually developed as the one when the infants are deemed to be of the age of consent and capable of entering into the contract of marriage."

want of physical capacity in either to bring about a procreation of species. The lawful and decent indulgence of the sexual inclinations and the generation of offspring being among the essential purposes of matrimony, the law regards all those who are incapable of this for want of physical capacity, arising from whatsoever cause, as incapable of carrying out the purposes of marriage.

§ 15. Physical incapacity — Extent.— The disability of physical incapacity which nullifies the marriage of a person is, generally speaking, “such physical defect or incurable disease . . . as will prevent sexual coition.”¹ The physical defect must be such as to actually prevent the generation of offspring. The law will never lend its assistance in dissolving a marriage for this cause where the union has been fruitful. Accordingly, in an action to nullify a marriage because of physical incapacity in the wife, which was alleged to have been known to her and concealed from her husband, it was shown that they were married July 14, 1890, and cohabited together as man and wife until a short time prior to the commencement of the action in June, 1892. It was shown that they had twins born unto them about seven months after the marriage, and the court thought that “this would seem to dispose of the question of the defendant’s want of capacity, unless plaintiff expected her to have triplets.”² In other words, those who are capable of and do bear children are not lacking in physical capacity to marry.

§ 16. Physical incapacity — Must exist at the time of the marriage.— The law never sanctions the annulment of a marriage on account of the disability of physical incapacity, unless the same existed at the time of the marriage. If it should exist before, or come into existence afterwards, the parties must bear the consequences. For, being competent at the time of marriage, they take each other for better or worse, and the law never permits a dissolution of this tie upon this ground unless it existed when the marriage was entered into.³ Pregnancy in

¹ *Franke v. Franke* (Cal.), 31 Pac. Rep. 571; *J. G. v. H. G.*, 33 Md. 401; *Y. S.* 164.
² *Riley v. Riley*, 73 Hun, 575, 26 N. Y. S. 164.
³ *Devanbaugh v. Devanbaugh*, 5 Paige Ch. 554; *Ryder v. Ryder*, 66 Vt. 158, 28 Atl. Rep. 1029, 5 Paige Ch. 554.

the woman at the time of the marriage by a stranger would be a physical incapacity if unknown to the man. If, however, with such knowledge, he nevertheless marries her, he could not set up this physical incapacity as a ground of annulment, for he would be estopped to do so.¹ But where the wife at the time of the marriage was afflicted with an incurable case of syphilis which was unknown to the husband before marriage, this was held to be such a physical incapacity in the wife as entitled the husband to a decree of nullity on this ground.²

§ 17. Mental incapacity — Effect of on marriage contract. The law universally recognizes the vital necessity of a sufficient degree of understanding in parties who enter into any contract of whatsoever kind, and none the less in marriage contracts. The overpowering necessities of the case forbid that any person, whether born an idiot or afterwards becoming a lunatic, or so far deprived of reasoning power and mental comprehension as not to know or understand the consequences, duties and liabilities of a marriage or other contract, to enter into the married state. This is the unbending rule of the common law handed down from the ages. Such contracts have always been regarded as void.³

§ 18. Status of those who have not capacity to marry because of unsound mind.— A person of unsound mind cannot be married. He may go through the ceremony and live as in married life, and so die. Yet this form will not constitute marriage. It will not enjoin upon him any of the duties of married life; will not create the estate of curtesy in the husband nor that of dower in the wife; will not, at common law, make the children, if any, of such union, legitimate; gives the wife no redress for wrongs by the husband, as such; authorizes no one to sell her necessities and bind the husband for same;

¹ *Franke v. Franke* (Cal.), 81 Pac. Rep. 571. *Keyes*, 22 N. H. 553; *Nonnemacher v. Nonnemacher*, 159 Pa. St. 634, 28

² *Ryder v. Ryder*, 66 Vt. 158, 28 Atl. Rep. 1029. Atl. Rep. 439; *Turner v. Turner*, 1 Hag. Con. 414; *Lewis v. Lewis*, 44

³ *Browning v. Reane*, 2 Phil. 69; 2 Minn. 124, 46 N. W. Rep. 323; *Jenkins v. Jenkins*, 2 Dana (Ky.), 103; *Wightman v. Wightman*, 4 Johns. Ch. 343. *Kent, Comm.* 75; 1 Bl. Comm. 438; *True v. Ranney*, 41 N. H. 52; *Cole v. Cole*, 5 Sneed (Tenn.), 57; *Keyes v.*

imposes no legal duty upon the parents to the children. The contract is the foundation of the relation. Without this contract, there can, in law, be no such relation. The question of want of mental capacity to contract matrimony received very intelligent discussion in the leading case of *Browning v. Reane*.¹ It was there contended that the marriage under consideration was void because at the time of entering into the contract the wife was incapable of binding herself by reason of mental incapacity. Sir John Nicholl in this case, quoting from Blackstone, said: "A fourth incapacity is want of reason, without a competent share of which, as no others, so neither can the matrimonial contract be valid. It was formerly adjudged that the issue of an idiot was legitimate, and consequently that his marriage was valid. A strange determination! since consent is absolutely necessary to matrimony, and idiots are not capable of consenting to anything; therefore, the civil law judged much more sensibly, when it made such deprivations of reason a previous impediment, though not a cause of divorce if it happened after marriage. And modern resolutions have adhered to the same reason of the law, by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void." Continuing, the learned jurist further says: "Here, then, the law and the good sense of the law are clearly laid down; want of reason must, of course, invalidate a contract; and the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from idiocy or lunacy or both combined. . . . If the incapacity be such, arising from either or both causes, that the party is incapable of understanding the nature of the contract itself, . . . such an individual cannot dispose of her person and property by the matrimonial contract any more than by any other contract." In these judicial utterances the law finds comprehensive expression.

§ 19. Mental incapacity — Exceptions to the rule — Weak-minded people.—The disability of insanity or other mental incapacity has always been recognized by the law in regard to contracts of marriage. But, as in other contracts, the want of mental capacity, in order to avoid this contract, must be such

¹ 2 Phil 69.

that the party contracting cannot comprehend the nature, effect or reality of the undertaking. But this rule does not go to the extent of vitiating a marriage because one or both of the parties may be very weak in intellect, or that on some subjects he or she may be unbalanced, so long as it is understood what is being done as well as the nature and consequences of the act. If these matters be sufficiently comprehended, it matters not that either party may have been enfeebled by disease or otherwise, or irrational on some subjects.¹

§ 20. Mental incapacity—Degrees of.—The question what degree of mental capacity is requisite to a valid marriage is one of difficulty which the courts themselves seem to have keenly felt.² It has been held, or at least intimated, that it is not necessary that one have as sound a mind to contract matrimony as is necessary in the case of other contracts.³ But this certainly is not in harmony with the pronounced trend of authority. And as a rule, each case must determine the question of mental capacity in the light of the particular facts as applied to the known rules of law.⁴ “What degree of mental imbecility, what extent of intellectual aberration, will suffice to annul a marriage contract it is difficult to pronounce. Certainly mere weakness of intellect, or even great eccentricity of conduct, unless it reaches a point that evinces inability to comprehend the subject-matter of the contract, will not suffice; and every principle of sound policy and humanity admonishes us that a contract so important should not be set aside upon slight grounds, or on less proof than would suffice to annul contracts less sacred and important in their nature.”⁵

§ 21. Mental incapacity—Belief in spiritualism.—The fact that a person may believe in spiritualism, as a religion or

¹ *Davren v. White*, 42 N. J. Eq. 569, 7 Atl. Rep. 682; *Kern v. Kern*, 51 N. J. Eq. 574, 26 Atl. Rep. 837; *Concord v. Rummey*, 45 N. H. 423, 428; *Banks v. Goodfellow*, L. R. 5 Q. B. 549.

² *Browning v. Reane*, 2 Phil. 69; *Ward v. Dulany*, 23 Miss. 410, 414; *Forman v. Forman*, 24 N. Y. S. 917.

³ *Kern v. Kern*, 51 N. J. Eq. 574, 26 Atl. Rep. 837; *Turner v. Meyers*, 1 Hag. Con. 414.

⁴ *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. Rep. 1001; *Durham v. Durham*, 10 Prob. Div. 80; *Kern v. Kern*, 51 N. J. Eq. 574, 26 Atl. Rep. 837.

⁵ *Ward v. Dulany*, 23 Miss. 410, 414. And this language of the Mississippi court received unqualified approval in the case of *Forman v. Forman*, 24 N. Y. S. 917.

otherwise, or any other supernatural thing, will not affect his mental capacity to make a valid contract of marriage. The rule is never carried to such an extent. Though the things believed in be merely a delusion, yet such is not recognized in the medical jurisprudence of insanity as dethroning the reason to the extent that a contract cannot be made with the necessary comprehension. For a person may well believe in all these and other myths and still possess every requisite of mental intelligence to bind himself by a contract, even though it be as sacred as that of matrimony.¹

§ 22. Mental incapacity — Evidence of.— In all cases where it is sought to avoid a marriage by reason of the mental incapacity of one or both of the parties, it must be determined whether the unsoundness of mind existed to the extent that the party could not understand the nature of the undertaking; and to this end it is proper to show by evidence the condition of the person, together with any acts or conduct, either before or after the marriage, which would tend to prove the incapacity. The issue in such cases becomes one of fact; and the question of the validity of the marriage hinges on the question of fact concerning the mental power to make the contract. This must be ascertained from the testimony, which, when determined the one way or the other, is necessarily conclusive.² Of course when a marriage is assailed on this or any other ground, the *onus* of proving the invalidity is on the party making the assault.³

§ 23. Mental incapacity — Presumptions in reference to. In all questions concerning the capacity of any one to contract a valid marriage by reason of alleged mental incapacity, where he has arrived at full age, and no other disabilities are made to appear, the presumption of law is always in harmony with the idea that all persons are of sound mind. This is true because want of capacity to contract is the exception, not the

¹ Robinson v. Adams, 62 Me. 369; Brown v. Ward, 53 Md. 376; Middleton v. Williams, 45 N. J. Eq. 726, 17 Atl. Rep. 826; Otto v. Doty, 61 Iowa, 23, 15 N. W. Rep. 578; In re Smith's Will, 52 Wis. 543, 8 N. W. Rep. 616.

² Nonnemacher v. Nonnemacher, 159 Pa. St. 634, 28 Atl. Rep. 439.

³ Nonnemacher v. Nonnemacher, 159 Pa. St. 634, 28 Atl. Rep. 439; Baughman v. Baughman, 82 Kan. 538, 4 Pac. Rep. 1003.

rule. And the law favoring the validity of all marriages, mental incapacity is never presumed.¹

§ 24. Mental incapacity — Must exist at the time of the marriage.— As is true in the case of physical incapacity, impotency, etc., mental incapacity, in order to be a ground for the annulment of a marriage, must have existed at the time the contract was made, and not before nor since. If this state unfortunately overtake either or both parties after the marriage, it cannot have any effect on the original or continuing validity of the marriage, but must be bravely borne, except in jurisdictions where, by statute, relief may be had. There is none at common law.²

§ 25. Mental incapacity — Drunkenness.— The marriage of a person who, at the time of making the contract, is so intoxicated as not to be able to comprehend what he is doing, is void. At least it is voidable at the suit of the drunken party. The drunkenness, when it exists to this extent, destroys the power of the mind to concur in the undertaking, just as the want of mental capacity, for any other cause, takes away this power.³ But mere intoxication which does not deprive the victim of reason to the extent of making him practically *non compos mentis* for the time being is not enough to avoid a contract of marriage entered into in such a state of intoxication.⁴ This is a wholesome rule, and serves to protect persons from imposition in connection with contracts of such importance. It is practically on the same footing as any other case of reason or knowledge of the consequences of a contract.

§ 26. Mental incapacity — Ratification.— While the law is always prompt to relieve against contracts where, by reason of mental incapacity to make the same, it has been entered into,

¹Browning v. Reane, 2 Phil. 69; Baughman v. Baughman, 32 Kan. 538, 4 Pac. Rep. 1003; Lewis v. Lewis, 538, 4 Pac. Rep. 1003; Powell v. Powell, 27 Miss. 783; Nonnemacher v. Nonnemacher, 159 Pa. St. 634, 28 Atl. Rep. 439. ²Prine v. Prine, 36 Fla. 376, 18 S. Rep. 781, 785.

³Nonnemacher v. Nonnemacher, 159 Pa. St. 634, 28 Atl. Rep. 439; ⁴Prine v. Prine, 36 Fla. 376, 18 S. Rep. 781.

yet it by no means follows that such contracts can in no way be cured. On the contrary, marriages contracted under such circumstances may, just like any other contract, be ratified, and when ratified with full knowledge of the facts, there being no other disability, such a marriage will be as binding as any other. If the injured party, whose reason is temporarily dethroned from any cause, upon regaining same elects to ratify instead of repudiate the contract, he may do so, when the contract will become valid for all purposes.¹ Where one regains his proper mental condition after contracting a marriage, he certainly has the capacity to contract, and the capacity to contract implies the capacity to ratify a contract already made. But where one is *non compos mentis* at the time of making the contract, he need not wait until he regains his reason in order to sue for its annulment, but may do so at any time.²

§ 27. Mental incapacity — Necessity for decree of nullity. Where parties have not mental capacity to contract matrimony there can be no marriage, and consequently there is nothing for a court to annul. In England, however, while it was recognized that this was not necessary, yet it was the custom to ascertain the fact of incapacity in the spiritual courts, and, this being done, the marriage would be decreed void. It was chiefly for the peace of mind of the parties in interest where there might be doubt as to the fact of mental incapacity; and the decree of nullity served the purpose of definitely and conclusively fixing the status of the parties with reference to the marriage, by which much confusion and uncertainty as to the validity of the marriage, as well as the legitimacy of the offspring, was averted.³

§ 28. Mental incapacity — Courts having jurisdiction in such cases.—In England the ecclesiastical courts exercised jurisdiction in matters of divorce as well as many other matters relative to the contract of marriage; but in this country the courts of chancery usually exercise jurisdiction in decreeing divorces

¹Forman v. Forman, 24 N. Y. S. 917; Prine v. Prine, 36 Fla. 376, 18 S. Rep. 781. ³Hays v. Watts, 3 Phil. 43; 2 Kent, Comm. 76; Turner v. Meyres, 1 Hag. Con. 414; Browning v. Reane, 2

²Turner v. Turner, 1 Hag. Con. 414. Phil. 69.

for this and other causes. We do not have the English system of spiritual jurisprudence in this country, and our common-law courts do not have this jurisdiction unless expressly conferred by statute. It naturally follows, therefore, that the courts of equity, by reason of their peculiar powers and elastic resources, are the proper tribunals in this country in which to seek this relief.¹ The jurisdiction is frequently lodged in the chancery courts by statute; but aside from statute, or when such jurisdiction is not expressly conferred upon other courts, chancery will be the proper forum in which to seek relief.

§ 29. Bigamous marriages.—In harmony with the divine law, the law of all civilized countries, as a rule, forbids marriages between persons one or both of whom have, at the time, a husband or wife living and undivorced. This being true, the law condemns as void all such contracts of marriage. By virtue of the second or bigamous marriage, no rights are created, nor are any of the duties arising by operation of law by reason of the first taken away. The first marriage retains its full validity; the second never has any. These were forbidden by statute in England,² by which it is also made a felony. Like statutes are generally to be found in the American states. But aside from the criminal feature of these marriages, the invalidity, from a civil standpoint, is the same.³

§ 30. Bigamous marriages — Exceptions to the general rule.—The rule that the marriage of a person having at the time a living husband or wife is void has its exceptions. When these recognized exceptions exist, the second marriage is valid, at least until the re-appearance of the first party, to all intents and purposes. These exceptions exist in cases where one of the parties has been absent from the other beyond seas for a certain period of time without being heard of. The period of time required by such absence is usually fixed by statute in the

¹ *Wightman v. Wightman*, 4 Johns. Ch. 343.

² 1 Jac. L., ch. 11.

³ *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. Rep. 957; *Peet v. Peet*, 52 Mich. 464, 18 N. W. Rep. 220; *Drummond v. Irish*, 52 Iowa, 411, 2 N. W.

Rep. 622; *United States v. Tenney* (Ariz.), 11 Pac. Rep. 472; *Cook v. Cook*, 144 Mass. 163, 10 N. E. Rep. 749; *Morrill v. Palmer* (Vt.), 33 Atl. Rep. 928; *Elliott v. Gurr*, 2 Phil. 16; 1 Bl. Comm. 164, 165; *Finney v. State*, 3 Head (Tenn.), 544; 1 Whart. Ev., § 421.

United States at from five to seven years. At common law the time was seven years.¹

§ 31. Bigamous marriages — Status of, when one of the parties has been absent seven years.— The common-law rule that a person may marry the second time when the other has been absent for the full period of seven years is only for the purpose of relieving a person of the pains and penalties of bigamy. The second marriage is not made valid by reason of the absence alone. Indeed, the contrary is the rule, unless the absent party be actually dead.² But in such cases, the first husband or wife would not be entitled to have the first marriage dissolved by reason of the adultery of the other party in marrying the second time under such a state of facts. The parties to the second marriage have the right to cohabit as man and wife. This is necessarily implied, for it would be idle in the law to tolerate a second marriage, and at the same time brand the cohabitation thereof as adulterous.³ And where a bigamous marriage has been entered into, the courts will not dissolve it for this reason where the former husband or wife has died before suit is brought.⁴

§ 32. Bigamous marriages — Effect of the death of the first husband or wife before proceedings to avoid second marriage.— The rule that one may not be twice married at

¹ Blackstone lays down the following exceptions to the rule as recognized in England, and these, or some of them, with various modifications, usually are in force in the different states, to wit: "First, where either party has been continually abroad for the space of at least seven years, whether the party had notice of the fact of the absent one being alive or not. Second, where either of the parties has been absent from the other seven years within the kingdom, and the remaining party has no knowledge of the other being alive within that time. Third, where there is a divorce or separation *a mensa et thoro*, by sentence of the ecclesiastical court, and the party loosed *a vinculo*. Fourth, where either of the parties was under the age of consent

at the time of the first marriage." 4 Bl. Comm. 164, 165.

² Kenley v. Kenley, 2 Yeates (Pa.), 207; Williamson v. Parisien, 1 Johns. Ch. 389; Heffner v. Heffner, 23 Pa. St. 104.

³ Vallean v. Vallean, 6 Paige Ch. 207. It is further held in this case that the last marriage is merely voidable, and not void; and that the first husband would have to file a bill in equity to annul the second marriage and get a decree accordingly, and that thereafter, but not before, the living with the second husband by the first wife would be adulterous, and consequently a ground for divorce.

⁴ Rawson v. Rawson, 156 Mass. 578, 31 N. E. Rep. 653.

the same time obtains though the death of the first husband or wife takes place before any proceedings are instituted to annul the second marriage. Thus, where A. married B. and afterwards, while this relation existed, married C., and before the death of C., but after the death of B., A. married D., the marriage to C. was void and that to D. was lawful. The intervening marriage to C., being null and void, could not affect the marriage with D., because of the death of the first wife to whom A. had been lawfully married.¹ But doubtless this rule would not hold good in those states where the common-law form of marriage is recognized as valid. For in such cases, under this rule, the second marriage would be held a good marriage *per verba de præsenti*, and consequently binding in every sense. This being true, the common-law marriage would become complete upon the death of B., and, C. being alive at the time of the marriage with D., this latter would be void because of the valid marriage existing with C.²

§ 33. Bigamous marriages — Mistake of fact — Effect of. The rule branding bigamous marriages as void loses none of its force by reason of a mistake of fact or a mistaken construction of the law by one or both of the parties. Nor can the good faith in an honest belief that, for any reason, they are again entitled to marry, alter the case. So far as the penal consequences of the second marriage or its civil status or validity are concerned, the law makes no distinction whatever.³ Nor will the fact that the parties by express agreement permanently separate from each other and mutually renounce all marital duties and obligations change the rule in the least.⁴ It has been held in Iowa that where a man and wife formally separate, and the man thereafter lives for years with a woman whom he treats and recognizes as his wife, and who is so reputed, the law will

¹ Rice v. Randlett, 141 Mass. 385, 6 N. E. Rep. 239.

² Teter v. Teter, 101 Ind. 129.

³ White v. White, 105 Mass. 325; Thompson v. Thompson, 114 Mass. 566; Teter v. Teter, 88 Ind. 498; Light v. Lane, 41 Ind. 539; Harbeck v. Harbeck (N. Y.), 7 N. E. Rep. 408; Glass v. Glass, 114 Mass. 563; Smith v. Smith, 5

Ohio St. 32; Teft v. Teft, 35 Ind. 44; Moors v. Moors, 121 Mass. 232; In re Clark's Estate (Pa.), 34 Atl. Rep. 68; Rooney v. Rooney (Pa.), 34 Atl. Rep. 682; Ward v. Dailey (N. C.), 23 S. E. Rep. 926; Succession of Taylor, 39 La. Ann. 823, 2 S. Rep. 581.

⁴ Lincecum v. Lincecum, 3 Mo. 441.

presume a valid dissolution of the first marriage by a decree of divorce in order to uphold the second.¹ But this seems to be carrying the rule of presumption quite far enough. For when a party to a marriage contract is once shown to be alive, the presumption that life continues obtains. It is true that this will not overcome the strong legal presumption of innocence with respect to the crime of bigamy, yet it is rather violent, in a civil case, to presume a divorce from the mere fact that a man and wife have separated by mutual consent. Indeed, the presumption, if it could ordinarily be carried to this extent, would be weakened by the fact that the separation was voluntary on the part of both. The very fact of the formal separation being agreed upon instead of a suit for divorce by one of the parties, implies that neither intended to go to law to have the tie loosed.

§ 34. Bigamous marriages — Modified rule in California.— The rule of the common law concerning marriages between persons, one or both of whom have at the time a living husband or wife, is modified by statute in this state. Here it is provided that if the husband or wife be absent from the other for five successive years, and the absent one is not known to be living by the party marrying the second time, or where the absent party is generally reputed and believed by the person again marrying to be dead, the second marriage will be valid until annulled by a court of competent jurisdiction.² And under a statute providing that marriages between parties, one of whom has, at the time, a living husband or wife, shall be void unless followed by cohabitation and issue, and that, when so followed, it could not be declared void after the death of one of the parties except for bigamy, the marriage of a woman who has a living husband, though believing him to be dead, and not having heard from him in seven years, and having no issue of the second marriage, is void, though no prosecution for bigamy could be had.³

§ 35. Bigamous marriages — Effect of subsequent decree of divorce — Kentucky statute.— It is held in Kentucky, where bigamous marriages are condemned by statute as positively

¹ *Blanchard v. Lambert*, 43 Iowa, 228.

³ *Ward v. Dailey* (N. C.), 23 S. E. Rep. 926.

² Code Cal., § 61; *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. Rep. 957.

void, that a woman who marries during the life-time of her husband, though she subsequently obtains a decree of divorce from the first, cannot assert any marital rights by reason of the second union. This is true though she continues to live with the second husband for years, having children by him, and is acknowledged by him as his lawful wife.¹ This ruling is not in harmony with the earlier cases in this state recognizing the validity of marriages *per verba de præsenti*.² But the early doctrine of the validity of these marriages in this state is now superseded by statute.³ And marriages, in order to be valid, must be attended with the required statutory formalities.

§ 36. Bigamous marriages — Absence of one party from the other — Knowledge of whereabouts — Good faith required.—In order that marriages have the full protection which the law affords where one of the parties has a living husband or wife, though absent for the requisite length of time and not heard from, the parties must act in good faith. They cannot conspire to be absent from each other and give no tidings of their whereabouts for the purpose of enabling either to marry again without a divorce; nor can either, knowing of the other's absence, wilfully and studiedly remain ignorant of the whereabouts of the absent one. All due diligence must first be used to learn the whereabouts of the absent one, and it must be used in good faith and with the honest purpose of endeavoring to get the information if possible. Otherwise, the second marriage will be void.⁴ It follows, then, of course, that where a person marries another, knowing that shortly before the marriage he or she had a living husband or wife, the marriage will be void, and no presumptions of divorce or death will be indulged to sustain it.⁵

§ 37. Bigamous marriages — Status of the second marriage — Necessity for decree of dissolution.—In cases where a second marriage is consummated, one of the parties having

¹ Harris v. Harris, 85 Ky. 49, 2 S. W. Rep. 549.

² Dumarsley v. Fishly, 3 A. K. Marsh. (Ky.) 377; Donnelly v. Donnelly, 8 B. Mon. (Ky.) 113.

³ Gen. Stat. Ky., ch. 52, art. 1.

⁴ Gall v. Gall, 114 N. Y. 109, 21 N. E. Rep. 106; Tyler v. Tyler, 30 N. Y. S. 330, 80 Hun, 406.

⁵ Succession of Taylor, 39 La. Ann. 823, 2 S. Rep. 581.

another partner living, there is no necessity for a decree of nullity of the second marriage. The law stamps it as void, and the parties themselves may so treat it and may both marry again, if at the time the only impediment to such marriage is the bigamous union. The fact, too, that by statutory enactment bigamous marriages may be dissolved will not change this rule of the common law. There must be at least a voidable marriage before the decree of a court, attempting to dissolve it, can be more than an idle thing.¹ The second marriage being void cannot affect the validity of the first, and, being void, there is really nothing for the courts to dissolve.

§ 38. Bigamous marriages — Statutory changes in the common law with reference to time of absence.— In many of the states the common-law period of time has been changed to five years. Under such a statute, where the absent party has been away the full period, the second marriage, if in good faith, will be valid until annulled by decree of court, though the first husband or wife be actually shown to be living, so far as a collateral attack upon the validity of the second marriage goes, but no further.² Of course the rule of law is precisely the same whether the husband or wife is absent, neither party being away from the other in order to evade the law.³

§ 39. Bigamous marriages — Status of, where one of the parties has been married but subsequently divorced.— The fact that the parties have been once absolutely divorced by a decree of court will not prevent them subsequently again marrying each other. And if the divorce be valid, either may

¹ Drummond v. Irish, 52 Iowa, 41, 2 N. W. Rep. 622; Cartwright v. McGown, 121 Ill. 388, 12 N. E. Rep. 735; Dare v. Dare, 52 N. J. Eq. 195, 27 Atl. Rep. 654; Patterson v. Gaines, 6 How. (U. S.) 550. And the fact that the party again marrying may have been divorced before the second marriage, where the decree of divorce, for want of jurisdiction of the parties, or for any other reason, is not valid, will not alter the status of a bigamous marriage, but it will be considered in law as though no such void pro-

ceedings had been had. McCreery v. Davis (S. C.), 22 S. E. Rep. 178. It is incumbent on the party claiming the validity of the second marriage because of a decree of divorce dissolving the first to prove the decree by proper evidence. The law will not supply the want of proof of the fact by a presumption. Morrill v. Palmer (Vt.), 33 Atl. Rep. 829.

² Charles v. Charles, 41 Minn. 201, 42 N. W. Rep. 935.

³ White v. Loew, 1 Red. 376.

marry another at pleasure. The divorce but places them, with reference to their capacity to marry, just where they were before being married at all.¹ In all cases of bigamous marriages courts of chancery are the proper tribunals in this country in which to invoke relief, unless jurisdiction is lodged in some other court by statute. This power is inherent in courts of equity aside from and independent of statutory provisions.² This would seem to be the correct rule upon reason and common sense, because were not this true there would be no source of relief in this country in such cases, as we have no spiritual courts which had jurisdiction of like cases in England. Yet some eminent authorities maintain that in the absence of a statute conferring such jurisdiction upon courts of chancery they have none.³

§ 40. Bigamous marriages — Law of Louisiana.— In this state the law provides that the marriage of a person in good faith, believing no ground of nullity exists, will be valid as

¹ *Baughman v. Baughman*, 32 Kan. 538, 4 Pac. Rep. 1003. In Massachusetts, where a decree of divorce *nisi* is authorized by statute, and which may be made absolute in certain cases, but which does not actually dissolve the marriage until so made, it is held, in a case where the wife obtained a decree of divorce *nisi*, which was subsequently, on November 21, 1882, made absolute, but where the wife had contracted a second marriage on the 20th, just one day before the decree dissolving the marriage, both parties to the second marriage believing in good faith that the decree would relate back to a time anterior to the second marriage, and believing they could lawfully marry, upon an issue as to the validity of the second marriage, that, in law and in fact, the woman having a lawful husband living at the time of the second marriage, though it was but one day before the final dissolution of the first, the second marriage was void, and the second husband was entitled to a decree of

divorce for this reason. *Googins v. Googins*, 152 Mass. 533, 25 N. E. Rep. 833; *Cook v. Cook*, 144 Mass. 163, 10 N. E. Rep. 749. So where a woman married a man who afterwards deserted her, and, believing him to be dead, married again. Her second husband then married another woman without any decree of divorce. Upon a complaint for a divorce at the instance of the first wife of the second husband, it was held, as she had a living husband at the time of the second marriage — though she believed him dead, — the second contract was void, and there was nothing for the court to dissolve. *Harbeck v. Harbeck* (N. Y.), 7 N. E. Rep. 408; *Elliott v. Gurr*, 2 Phil. 16.

² *Rooney v. Rooney* (Pa.), 34 Atl. Rep. 682. See also *Wightman v. Wightman*, 4 Johns. Ch. 343.

³ *Kelly v. Kelly*, 161 Mass. 111, 36 N. E. Rep. 837; *Ridgely v. Ridgely*, 79 Me. 298, 29 Atl. Rep. 597; *Griffin v. Griffin*, 47 N. Y. 135; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456.

to both parties so far as the civil effects thereof are concerned, and will be valid only as to one when one only is innocent, and will be valid as to the issue of the marriage when either is innocent and acts in good faith.¹ And a mistake, either of law or fact, is sufficient upon which to ground the required good faith.² But the marriage of a woman with a man whom she knew had a living wife at the time—the fact, of course, being also known to him—will invalidate the second marriage as to both parties, from which no legitimate offspring can issue.³ Indeed, such marriages are void and of no force whatever, regardless of any statute or local law.⁴ A material distinction made in this state seems to be that, in order to give civil effect to a marriage which would ordinarily be void—at least voidable,—the parties, one or both, must enter upon the matrimonial state in the *bona fide* belief that the marriage contracted is valid in all respects.⁵ And where the good faith of one or both of the parties is challenged to overthrow a marriage, the burden is on the party thus assailing the marriage.⁶

§ 41. Bigamous marriages — Presumptions of fact in reference to.—Where a valid marriage is once shown to exist, all presumptions of fact—especially in criminal cases,—in the absence of any contrary showing, will be indulged to uphold the marriage. And this presumption obtains even in cases where a party to a second marriage contract is shown to have another husband or wife living at the time of the second marriage, as the law will presume a divorce to have been first

¹ Civ. Code La., arts. 117, 118; *Smith v. Smith*, 43 La. Ann. 1140, 10 S. Rep. 248; *Succession of Barry* (La.), 20 S. Rep. 656; *Abston v. Abston*, 15 La. Ann. 137; *Succession of Buissiere*, 41 La. Ann. 217, 5 S. Rep. 668; *Succession of Taylor*, 39 La. Ann. 823, 2 S. Rep. 581. But this provision of the Louisiana code has reference only to those marriages contracted in that state. It has no extra-territorial force. *Smith v. Smith*, 43 La. Ann. 1140, 10 S. Rep. 248.

² *Succession of Buissiere*, 41 La. Ann. 217, 5 S. Rep. 668.

³ *Succession of Taylor*, 39 La. Ann. 823, 2 S. Rep. 581; *Monier v. Coutejean*, 45 La. Ann. 419, 12 S. Rep. 623.

⁴ *In re Clark's Estate* (Pa.), 34 Atl. Rep. 68; 1 Bl. Comm. 436; *Pride v. Earl of Bath*, 1 Salk. 120; 2 Kent, Comm. 79.

⁵ *Patton v. Philadelphia*, 1 La. Ann. 98; *Harrington v. Barefield*, 30 La. Ann. 1297; *Succession of Navarro*, 24 La. Ann. 298.

⁶ *Succession of Navarro*, 24 La. Ann. 298.

granted to the party marrying the second time, or, if the other party to the first marriage has not been heard from in seven years, he will be presumed to be dead, and the marriage sustained upon this presumption.¹ But the presumption does not take the place of the existing contract nor serve to annul it as of course. It is but a presumption which may relieve the party marrying a second time under the *bona fide* belief that the other is dead, after an absence of seven years, of the pains and penalties of bigamy by reason of the second marriage. But the presumption does not invalidate a valid marriage nor make valid an invalid one. And the fact that the supposed husband or wife is living instead of dead, when established by proper evidence, will have the effect of completely annulling the second marriage.²

§ 42. Bigamous marriages — Presumption of death from lapse of time — Instances of application of the rule.—So zealous is the law to uphold all marriages that it is frequently the case that a marriage will be sustained by reason of the legal presumption of death of one of the parties when he or she has been absent a much shorter period than seven years. The courts never strain themselves to declare a marriage void because one of the parties had been previously married and not divorced, when it is shown that the other has been absent a long time before the second marriage without being heard from. In some cases an absence of four years has been held sufficient upon which to base this presumption of death.³ Likewise an absence of only two years.⁴ But while a period of one year is usually very short, indeed, in which to presume the death of a person, yet it is not necessarily unreasonable in all cases. The presumption must rest, to a large extent, upon the peculiar facts and circumstances of each case. The death of a man in the full vigor of life and in the best of health would not be as readily presumed in a short length of time as in the case of one who is

¹ Klein v. Laudman, 29 Mo. 259; Thomas v. Thomas, 124 Pa. St. 646, 17 Greensboro v. Underhill, 12 Vt. 606; Atl. Rep. 182.

Hull v. Rawls, 27 Miss. 471; Dixon v. ³ Yates v. Houston, 3 Tex. 433; Hull v. Rawles, 27 Miss. 471.

People, 18 Mich. 84; Bouldin v. McIntire, 119 Ind. 574, 21 S. E. Rep. 445. ⁴ Harris v. Harris, 8 Ill. App. 57;

² Heffner v. Heffner, 23 Pa. St. 104; Squire v. State, 46 Ind. 459.

Kenley v. Kenley, 2 Yeates (Pa.), 207;

old, infirm, feeble and hopelessly diseased. The character of the absence itself may often be a very material circumstance to consider. Where one goes to a distant land to stay several years, the fact that he does not return earlier than when on a short trip would not raise such a presumption of his death as when his purpose in going is to remain but a short while. Again, instances might occur where it would be entirely proper to presume the death of an absent person in a very few weeks after his departure. For instance, one embarks, we will say, at New York for Liverpool on one of the well-known fast passenger steamers. The usual time in making the voyage is about a week. Suppose the ship is not heard from again? In such event, it would be entirely proper to presume, in a few weeks, that the passenger went down with the ship at sea.

§ 43. Bigamous marriages — Presumptions of law as to divorce.— There is generally little necessity for courts to presume the dissolution by law of a marriage in order to sustain a second contract. And, ordinarily, it would seem not the best practice to indulge such presumptions, unless after a great lapse of time and the incident difficult of establishing stale facts by proof. But where there is no obstacle to proof of the divorce, the presumption of life is as strong as that the parties have dissolved at law the most sacred and solemn of all contracts. Especially should this be true in view of the fact that the *onus* is on the party relying on the second marriage to show that the prior one was annulled by process of law. Ordinarily, a person once shown to be alive is presumed to so continue until the contrary appear. This is the better rule in civil cases, though in criminal cases the presumption of innocence would be superior.¹ And where a man and wife have always lived in one place, and the court records of the county show no divorce to have been decreed dissolving their marriage, there is no presumption of divorce because one of them again marries, and there should not be.²

¹ People v. Feilen, 58 Cal. 218.

² Barnes v. Barnes, 90 Iowa, 282, 57 N. W. Rep. 851. And even where the law excuses a second marriage because of the long absence of one of the parties to the first marriage, this

grace will be withheld unless the party marrying again believes, in good faith, that the other is dead. Barnes v. Barnes, 90 Iowa, 282, 57 N. W. Rep. 851.

§ 44. Duress — Effect of.—The general rule of law in regard to all contracts, and no less with reference to contracts of marriage, is: it is essential to validity that they be entered into by both parties perfectly free from any overpowering influence or fear. Without this free and unbridled will there can be no contract which the law will recognize as binding. Indeed, any other rule would permit force or fear to take the place of the free will and voluntary consent of the parties, and fasten upon them a contract of marriage with its awful solemnities and grave responsibilities to which they have not in any manner really assented. So, when a marriage contract is brought about by force or putting in fear, the law stamps it as void and of no effect whatever. Such a contract may be attacked collaterally; no obligation can be enforced by reason thereof, and it may be judicially declared void at the suit of the party imposed upon.¹

§ 45. Duress — What is sufficient.—It is not every imaginable form of duress, however, that will be regarded in law as sufficient to overcome a contract otherwise regularly made. And in order to avoid a marriage by reason of duress or force of any kind, it must appear that it was consummated by virtue of the influence of the overpowering awe excited by the duress, or whatever means are resorted to in order to force the making of the agreement. It is necessary, in order to avoid a marriage contract upon this ground, that the mind be subjected to such pressure as to practically or actually destroy the free will of a person of ordinary fortitude and bravery.² Indeed, the circumstances of each particular case must have much to do in declaring a marriage void because of duress in procuring the contract. A weak, helpless woman, among strangers, would more readily enter into a contract from the force of fear, or the fear of force, than a strong man where there might be no physical superiority to overawe him. This being true, the question of duress will usually be one of fact.³

¹ *Anderson v. Anderson*, 26 N. Y. S. 492; 2 *Kent*, Comm. 76; *Shoro v. Shoro*, 60 Vt. 268, 14 Atl. Rep. 177. *Green*, 26 Mich. 70; *Taylor v. Cottrell*, 16 Ill. 93.

² *Schwartz v. Schwartz*, 29 Ill. App. 516; 2 *Greenl. Ev.*, § 301; *Feller v. Schwartz*, 29 Ill. App. 516. ³ *Feller v. Green*, 26 Mich. 70; *Taylor v. Cottrell*, 16 Ill. 93; *Schwartz v. Schwartz*, 29 Ill. App. 516. Where a

§ 46. **Duress of third persons—Effect of.**—It has been held that the duress which will warrant a court in dissolving a contract of marriage must be that of one of the parties.¹ But this theory that the marriage must hold good unless the celebration was brought about by the duress of one of the parties is evidently not sound. The object and end of the law of duress with regard to contracts is to protect all persons in the absolutely untrammelled free agency which knows no restraint or fear in making contracts. A contract which is forced upon one by the power of fear exerted by some third party having nothing to do with the contract as a party thereto is nevertheless a contract entered into without free agency or unbridled will. And as consent, if lacking for this reason, does not enter into such a contract, it must necessarily follow that such contracts are void for duress to the very same extent where the duress moves from a third party as though proceeding directly from one of the parties making the contract. That the compulsion comes from an outside source does not make the agreement of the party compelled his free and voluntary act, without which no contract of marriage, or other contract, is binding.²

§ 47. **Duress—Threats of imprisonment—Effect of.**—The mere fact that one or both parties enter into a marriage contract by reason of the threats of a third person, or of one of

girl of nineteen, while away from her home and parents, was decoyed by a man to the house of his confederates, some of whom were infamous criminals, and there, through fear of the surroundings as well as personal violence, consented to the ceremony of marriage, with the mental reservation that it would afford her the opportunity to find escape from her environments, which being done at first opportunity and before any cohabitation, she renounced the marriage, and, with manifest justice and propriety, it was held void. *Ferlat v. Gojon*, 1 Hopk. Ch. 478.

¹*Sherman v. Sherman*, 20 N. Y. S. 414. In this case the plaintiff was threatened with loss of life if he did not marry the defendant. But it was

not shown in evidence that the defendant knew of or was in any way responsible therefor. The court, *inter alia*, said: "To justify the annulment of the marriage, it should appear that the plaintiff's duress was occasioned by the defendant, and that she uttered or instigated the threats of imprisonment or bodily harm, and was cognizant of them, or, at least, that at the time of the marriage ceremony she knew or had reason to believe that plaintiff was impelled to marry her by fear that the threats of imprisonment and bodily harm would be carried into execution if he did not marry her."

²*Marks v. Crume* (Ky.), 29 S. W. Rep. 436.

the parties, to do an act authorized and sanctioned by law, will not invalidate a marriage contract thus brought about on the ground of duress.¹ Of course, if the mere forms of law are resorted to for the purpose of coercive measures alone, and the measures brought to bear are not authorized by law, though attempted to be carried out under the guise of a legal proceeding, this would amount to duress in law.² But a marriage cannot be avoided for duress where a person marries the mother of a bastard child, knowing he cannot be the father thereof, though he be induced to enter into the marriage to avoid a criminal prosecution.³ Likewise where one is lawfully arrested for seduction and marries the woman in order to evade the criminal laws, he will not be permitted to avoid the contract because of any duress thus imposed.⁴ And this is true though he subsequently learned that a conviction could not have been sustained.⁵ Of course, if the parties are otherwise competent, and the injured one elects to waive the duress, this may be done; for this would be the only obstacle in the way of the validity of the marriage, and none could complain of this but the injured one. Such one may either ratify the wrong or disregard the contract for duress.⁶

§ 48. Fraud.—It is one of the fundamental principles of elementary law that fraud vitiates all contracts, including those pertaining to marriage. No one is ever permitted to profit by his fraudulent acts or purposes; and whenever it is shown that a contract of marriage has been brought about by fraudulent practices or declarations as to vital matters concerning the contract, the courts will lend a ready ear to an application to set the same aside. Consent to a contract of marriage superinduced by actual fraud is no more consent than that obtained by force or fear. The fraud overcomes the voluntary consent.⁷

¹ *Lacoste v. Guidroz*, 47 La. Ann. S. W. Rep. 875; *Jackson v. Winne*, 7 295, 16 S. Rep. 837. Wend. 47; *Honnett v. Honnett*, 33

² *Lacoste v. Guidroz*, 47 La. Ann. Ark. 156. 295, 16 S. Rep. 837.

³ *Scott v. Schufeldt*, 5 Paige, 43; *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 S. Rep. 837. *Williams v. State*, 44 Ala. 24.

⁴ *Copeland v. Copeland* (Va.), 21 S. E. Kent, Comm. 76, 77; *Keyes v. Keyes*, Rep. 241; *Merando v. State*, 32 Tex. 22 N. H. 553; *Portsmouth v. Portsmouth*, 1 Hagg. 355; *Ferlat v. Gojon*, Cr. App. 214, 22 S. W. Rep. 684.

⁵ *Marvin v. Marvin*, 52 Ark. 425, 12 1 Hopk. Ch. 478.

§ 49. **Fraud — What necessary to constitute.**— Fraud, in order to vitiate a contract of marriage, must be a deceit as to an essential and necessary part of the contract or the facts inducing it. One may not avoid a contract of marriage for fraud, as a general rule, because of a mistake of the supposed social or general standing, health, habits, disposition, fortune or felicity of the other. Because, taking each other “for better, for worse, for richer, for poorer,” etc., it would be contrary to the necessities and requirements of society to permit the parties, or either of them, to disaffirm the contract and procure its annulment by law because of some infirmity of health, disposition or like defect in one of the parties not known at the time of the marriage by the other.¹ A marriage will not be declared void for fraud because one of the parties represented to the other that he had never been divorced, for this does not go to the foundation of the contract. And this is true though the defrauded party would not have consented to the contract had the real facts been known.²

§ 50. **Fraud — Degree of required.**— The general rule that fraud avoids all contracts seems not to apply in its strictest

¹ *Ewing v. Wheatly*, 2 Hag. Con. 175; 2 Kent, Comm. 77; *Weir v. Still*, 31 Iowa, 107; *Clowes v. Jones*, 3 Curt. 185. “Fraudulent representations of wealth, or connections, or health, or temper, or disposition,” say the supreme court of Michigan, “may in many cases be the chief inducements to matrimonial alliances, but no one has ever supposed that a marriage could be avoided for such cause.” *Leavitt v. Leavitt*, 13 Mich. 452, 456.

² *Fisk v. Fisk*, 34 N. Y. S. 33. In this case the court disposed of the question thus: “Assuming that the alleged representations were made; that they were untrue; that the plaintiff was deceived by them, and induced to enter into a contract which he would not have made had he known the facts,—the question to be determined is whether the deceit was of that serious character which authorizes the annulment of the mar-

riage.” The doctrine of this case, too, finds support in *Clarke v. Clarke*, 1 Abb. Pr. 228, where Sutherland, J., speaking for the court, said: “Conceding that the representations of the defendant as to the death of the first wife were fraudulently made, and that the plaintiff would not have married him had she known or supposed that his first wife was living, yet it is clear to me that such fraud or deception does not furnish sufficient ground for dissolving the marriage contract between the plaintiff and defendant, and for declaring it to have been void from the beginning. It was not a fraud in or as to a material matter or thing within the ordinary or legitimate purposes of marriage. . . . I find neither principle nor precedent for declaring a marriage void for fraud as to or in such a matter or thing.”

sense to contracts of marriage. These "are *sui generis* in many respects, and should not be vitiated, even if fraudulent, when against good policy, sound morality and the peculiar nature of the relation. To be free from that restriction, the fraud must be of an extreme kind, and in an essential part of the contract."¹ The law requires that, when one or both parties act on representations or suppositions in regard to matters not vital to the contract itself, they should bear the consequences which result from such contracts which they have made of their own accord. After such contracts are consummated, the evils flowing from a rule tolerating the indiscriminate dissolution of these would be far greater than those resulting from the rule of law which requires them to stand, and which withholds relief from the results of "a blind credulity, however it may have been produced."² The procuring of one not authorized by law to solemnize matrimony, where the other party believes such person so authorized, and, so believing, consents to the marriage, the marriage so procured may be annulled at the suit of the defrauded party, though after cohabitation, where the deceit is not sooner discovered.³ Where one party is young and in full vigor and health of mind and body, and the other old, infirm and feeble, both physically and mentally, and possesses large wealth by recent acquirement, and is induced, while under the influence of intoxicants or drugs, though not to such an extent as to destroy the reasoning power, to enter into a marriage contract with a

¹ *Coris v. Coris*, 9 C. E. Green (N. J.), 516, 523.

² *Wakefield v. Mackay*, 1 Phil. Ecc. 134; *Ewing v. Wheatley*, 2 Hag. Con. 175; *Reynolds v. Reynolds*, 3 Allen (Mass.), 605; *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. Rep. 323; 2 Kent, Comm. 77; *Foss v. Foss*, 12 Allen (Mass.), 26; *Scroggins v. Scroggins*, 3 Dev. (N. C.) 535; *Farr v. Farr*, 2 MacAr. 35; *Wier v. Wtill*, 31 Iowa, 107, 111. Where a girl under eighteen, the age required to marry without consent of parents, entered into a marriage without such consent, and where license for the marriage was procured by the fraudulent representations and false swear-

ing of the man as to the age, and where the girl, on learning these facts and before cohabitation, renounced the marriage, it was held that a case of legal fraud had been made out. *Robertson v. Cole*, 12 Tex. 356. See to like effect, *Parsons v. Parsons* (Vt.), 34 Atl. Rep. 33. Where a woman had a loathsome and incurable disease which would probably be transmitted to her offspring, and concealed this from the husband purposely, the marriage was declared fraudulent and void. *Meyer v. Meyer*, 49 How. Pr. 311.

³ *Beggs v. State*, 55 Ala. 108; *Farley v. Farley*, 94 Ala. 501, 10 S. Rep. 646.

comparative stranger for whom no love existed, the marriage was properly declared void for fraud.¹

§ 51. Fraud — Equity jurisdiction.— By reason of the unbending rule of equity that fraud vitiates all contracts of whatsoever kind, and by reason of the fact that we have no spiritual courts in this country, the jurisdiction to declare marriages void for fraud is usually lodged in the courts of chancery in the absence of legislative action placing it elsewhere. Equity, therefore, is the proper tribunal in which to seek relief in such cases.² But the decree in all cases of fraud will be granted only at the instance of the party injured, not at the suit of the party concerned in or guilty of the fraud.³ It is contrary to the policy of the law to permit a party to profit by his own fraud. For should he be permitted to do so, the law would simply encourage rascality and bad faith in making marriage contracts. Only the injured one, therefore, will be heard to complain.

§ 52. Fraud — Object of the rule — Question of fact.— The purpose of the law in relieving against fraudulent marriages is to protect the weak and credulous from imposition; and it extends as well to the most careful and prudent. What, therefore, might amount to fraud in one instance might not in

¹ *Gillett v. Gillett*, 78 Mich. 184. Under the New York Penal Code, section 851, it is made highly criminal for one to conduct a pool room as a business. A man was engaged in this business some time before his marriage. This fact he intentionally kept from his wife. Investigation by her failed to show anything but a good character. Confiding in this belief she married him. He was shortly afterwards arrested for violating the law, and, for the first time, the nature of his occupation thus became known to his wife. This was held a sufficient fraud to justify a decree of dissolution of the marriage. *King v. Brewer*, 29 N. Y. S. 1114. It is true that the decision in this case was based upon section 1743, subdivision 4, of the Code

of New York, providing that where the consent of one of the parties to a marriage was obtained by force, duress or fraud, it might be annulled, but this is little if anything more than a re-enactment of the common law on the subject with some possible enlargement. See also *Keys v. Keys*, 26 N. Y. S. 910; *Moot v. Moot*, 37 Hun, 288; *Hull v. Hull*, 5 E. L. & Eq. 589; *Lyndon v. Lyndon*, 69 Ill. 43.

² *Parsons v. Parsons* (Vt.), 34 Atl. Rep. 33; *Fornhill v. Murray*, 1 Bland Ch. 479; *Ridgely v. Ridgely*, 79 Md. 298, 29 Atl. Rep. 597.

³ *Ridgely v. Ridgely*, 79 Md. 298, 29 Atl. Rep. 597; *Beggs v. State*, 55 Ala. 108; *Farley v. Farley*, 94 Ala. 501, 10 S. Rep. 646.

another. The credulous and confiding might be misled where a person of sagacity and prudence would not. It necessarily follows, therefore, that, generally speaking, the question of fraud with reference to contracts of marriage will be one of fact.¹ The question of fact is, how far did the representation or fraudulent act or practice affect the mind of the injured party? If it be such that the party deceived had the right to rely upon it under all the circumstances, and go to the essence of the contract itself, it necessarily follows that it would avoid the agreement.²

§ 53. Fraud — Incontinency on part of the wife — Effect of.—While the law does not consider minor matters, such as financial worth, social standing, disposition, etc., as vital to the contract of marriage with reference to the element of fraud, yet where the fraudulent fact is one involving, as it were, the very substructure of the marital relation as well as matrimonial happiness, a different case is presented. If, at the time of making the marriage contract, the wife be pregnant by a stranger without the knowledge of the husband, this is such a fraud upon him as will avoid the marriage. The procreation of kind being an essential element of the contract of marriage, a woman who offers herself as a wife in this condition is not capable of fulfilling the sacred duty of bearing children to her husband.³

¹ *People v. Court of Oyer and Terminer*, 83 N. Y. 436, 449.

² *Keys v. Keys*, 26 N. Y. S. 910; *Thomas v. People*, 84 N. Y. 351.

³ *Baker v. Baker*, 13 Cal. 87. In this case the learned Judge Field announced the law in the following chosen language: "It cannot be pretended that the condition of the defendant was not a most material circumstance to the consent required for the validity of the contract. Its concealment operated as a fraud upon the plaintiff of the gravest character. His contract was with her and for her; it referred to no other person, much less included a child of bastard blood. . . . The first purpose of matrimony, by the laws of nature and society, is procreation. A

woman to be marriageable must, at the time, be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract. . . . The second purpose of matrimony is the promotion of the happiness of the parties by the society of each other, and to its existence, with a man of honor, the purity of the wife is essential. . . . We can conceive of no torture more terrible to a right-minded and upright man than a union with a woman whose person has been defiled by a stranger, and the living witness of whose defilement he is compelled to recognize as his own offspring, as the bearer of his name and the heir to his estate, and that too with the silent if not expressed

The very revolting consequences that might ensue in all such cases is well illustrated in a New York case. The husband had been arrested at the instance of a woman who had given birth to a bastard child, and who had duly made oath before the proper officer that he was the father. He had not seen the child, and believing it to be his, and not being able to give bond, consented to marry the woman. Upon ascertaining that the child was a mulatto — both himself and the woman being white,— he at once repudiated the marriage and sued to annul the same on the ground of the fraud thus practiced upon him, and the court very promptly and properly decreed the nullity of the marriage.¹ Nor is the rule changed by reason of the fact that the woman, at the time of making the assurances, really believes the husband is the parent. If the truth of the matter be otherwise, the consequences are the same.²

§ 54. Fraud — Effect of in cases of previous unchastity where the husband is party thereto.— It is held in some jurisdictions that where a man is guilty of sexual intercourse with a woman whom he afterwards marries, upon the assurance, however, that no other person has had connection with her, and relying on and believing this to be true he enters into the contract, he will not afterwards be heard to complain of fraud if the woman happen to be pregnant by a stranger at the time. The courts put this upon the principle that he marries a woman whom he knows to be impure, and that, while she may deceive him as to the paternity of the child with which ~~she~~ may be pregnant at the time of the marriage, and though

contempt of the community." See, to like effect, *Sissung v. Sissung*, 65 Mich. 180, 31 N. W. Rep. 770; *Harrison v. Harrison*, 94 Mich. 559, 54 N. W. Rep. 275. "A husband has a right to require that a wife shall not bear aliens to his blood and lineage. This is implied in the very nature of the contract of marriage. Therefore a woman who is incapable of bearing a child to her husband at the time of her marriage, by reason of her pregnancy with another man, is unable to perform an important part

of the contract into which she enters; and any representation which leads to the belief that she is in a marriageable condition is a false statement of a fact, material to this contract, and, on well settled principles, affords good ground for setting it aside and declaring the marriage void." Bigelow, C. J., in *Reynolds v. Reynolds*, 3 Allen (Mass.), 610.

¹ *Scott v. Schufelt*, 5 Paige, 43.

² *Harrison v. Harrison*, 94 Mich. 559, 54 N. W. Rep. 275.

the husband, through the best of motives and to save both the wife and offspring from disgrace, in part at least, makes the contract, he cannot, although all these things be fully true, complain that the marriage was procured by the woman upon such false representations.¹

§ 55. Fraud — Concealment of previous pregnancy — Effect.— Regardless of cases where a man marries a woman whom he knows to be pregnant, but does so under the belief that he is the real cause of the pregnancy, the authorities practically all agree that the concealment by a woman of her pregnancy, whereby she procures one to contract marriage with her, is sufficient to invalidate the marriage for fraud. This vital element of the marriage contract goes to the very foundation, and is far different from the minor matters of wealth, social standing, etc. When, therefore, a man has been thus deceived and induced to make the contract, he will be entitled, upon ascertaining the fact of fraud, to renounce the agreement and treat it as fraudulent and void, as it really is.²

§ 56. Fraud — Previous pregnancy — Rule in North Carolina.— Contrary to the rule announced in New York and other states, it has been held in North Carolina in a case where the wife was pregnant at the time of the marriage by a negro, which fact was unknown to the husband, both parties being white, that such a marriage must be upheld. This is upon the stern and unrelenting ground that the deceit by a woman practiced on the husband by having him believe her pure, though she had been defiled by a negro, and as a conse-

¹ *Seilheimer v. Seilheimer*, 40 N. J. Eq. 412, 2 Atl. Rep. 376; *Carris v. Carris*, 24 N. J. Eq. 516. A like rule obtains in Kentucky, but it is grounded upon a statute of that state providing that "cohabitation as man and wife, after knowledge of adultery or lewdness complained of, shall take away the right of divorce therefor." *Steele v. Steele* (Ky.), 29 S. W. Rep. 17. So, in the case of *Franke v. Franke* (Cal.), 31 Pac. Rep. 571, it is held under a statute of California, which, however, is practically a re-

enactment or declaration of the common law, though the decision seems to be grounded upon the statute, that marriages under like circumstances cannot be avoided for fraud. This decision is opposed to *Baker v. Baker*, 13 Cal. 87.

² *Reynolds v. Reynolds*, 3 Allen (Mass.), 609; *Carris v. Carris*, 9 C. E. Green (N. J. Eq.), 516; *Morris v. Morris*, *Wright* (Ohio), 630; *Ritter v. Ritter*, 5 Blackf. (Ind.) 81; *Scott v. Schufelt*, 5 Paige, 43.

quence had become pregnant with a mulatto child, was not sufficient to annul the marriage.¹ A similar question came before the court of last resort in a later case, and it was again held that though a woman was pregnant with child by a stranger, which fact she had fraudulently and successfully concealed from her husband until after the marriage, the marriage must be considered binding, though the husband, immediately upon the discovery of the fraud, renounced the marriage and sued to dissolve it.² This later case, however, was decided by a divided court, and the conclusion of the majority seems to have been reached with reluctance. The able dissenting opinion of Judge Rodman reasons out the law much more clearly and satisfactorily.

§ 57. Fraud — Estoppel.— As the primary object of the law of fraud is to protect the innocent and blameless, it is but reasonable that the protection of the law will be withheld from those who do not show themselves worthy of it. Therefore if a man, well knowing a woman to be lewd, nevertheless marries her, he will not be heard to complain of fraud practiced by her as to her chastity, though she bear a child after the marriage previously begotten by a stranger.³ Furthermore, it is not necessary that the man have knowledge of the real facts. If such facts are brought home to him as, if followed by due inquiry, would lead to an ascertainment of the truth, he will be charged with knowledge of all that such inquiry would lead to.⁴

§ 58. Fraud without injury — Condonation.— The purpose of the law being to protect those who are injured by fraud, it follows that no fraud will be relieved against where there is no resulting injury.⁵ So where parties who could avoid a mar-

¹ *Scroggins v. Scroggins*, 4 Dev. (N. C.) 535. And see as well, *Barden v. Barden*, 3 Dev. (N. C.) 548.

² *Long v. Long*, 77 N. C. 304.

³ *Scroggins v. Scroggins*, 3 Dev. (N. C.) 535. Likewise, where the woman is known to be pregnant by a stranger at the time of the marriage. *Farr v. Farr*, 2 MacAr. 35. Or even where he is ignorant of the particular fact, if he knows her to be a loose woman, for this knowledge puts him upon inquiry. *Crehore v. Crehore*, 97 Mass. 330.

⁴ *Foss v. Foss*, 12 Allen (Mass.), 26. See also, to like effect, *Clark v. Clark*, 97 Mass. 330.

⁵ *Ark. & La. Ry. Co. v. Smith*, 53 Ark. 275, 13 S. W. Rep. 929; *Lake v. Tyree*, 90 Va. 719, 19 S. E. Rep. 787; *Thompson v. Crane*, 73 Fed. Rep. 327; *Fellows v. Lewis*, 65 Ala. 343; *Stanley v. Snyder*, 43 Ark. 430.

riage for fraud elect rather to ratify and condone it, the law then presumes that they are not injured, and they will be presumed to have elected to ratify the fraud, unless they repudiate the agreement promptly upon discovering it.¹ The law, however, having a due regard for human infirmity, will not lend its aid to annul a marriage for fraud after a great lapse of time, unless it be in rare cases. Upon this principle it has been held, where a man before contracting marriage made diligent inquiry as to the standing of his contemplated wife, and could learn nothing unfavorable to her, and after being assured by her and her parents that she had lived a blameless life, that he could not show in avoidance of the marriage for fraud, after living with her for twenty years, that she had been unchaste with other men before the marriage.²

§ 59. Capacity of slaves to contract.—A marriage between persons in a state of slavery was generally held, in the slave states, to be void because of the ownership of the slaves in the master, which practically took away their free agency. They could make no contract which was incompatible with their state of bondage.³ And this has been held to be the rule though a male and female were competent, but for their state of slavery, to marry, and though they might, in accordance with the custom among slaves and with the consent of their master, consummate the marriage and live together as husband and wife, and though the man is afterwards emancipated and purchases his wife.⁴ While slaves in a sense were incapacitated

¹ *King v. Brewer*, 29 N. Y. S. 1114; *Lyndon v. Lyndon*, 69 Ill. 43.

² *Leavitt v. Leavitt*, 13 Mich. 452; *Best v. Best*, 1 Add. Ecc. 411; *Scroggins v. Scroggins*, 3 Dev. (N. C.) 535; *Reynolds v. Reynolds*, 3 Allen (Mass.), 605, 609. The reason of this rule is that generally more harm would follow the dissolution of a marriage which had been recognized so long, than to annul it and thereby inflict bastardy upon the children and disgrace upon the parents.

³ *Andrews v. Page*, 3 Heisk. (Tenn.) 633, 660; *State v. Samuel*, 2 Dev. & Bat. (N. C.) 177; *Hall v. United States*, 92 U. S. 27; *Howard v. Howard*, 6

Jones (N. C.), 235; *Smith v. State*, 9 Ala. 990; *Malinda v. Gardner*, 24 Ala. 719; *McDowell v. Sapp*, 39 Ohio St. 558.

⁴ *Howard v. Howard*, 6 Jones (N. C.), 235. But this reasoning is repudiated in Tennessee so far as it condemns marriages between slaves with the sanction of their master. The lack of capacity to contract, it seems, is supplied by the consent of the owner, just as the consent of a parent or guardian supplies that of non-age in an infant. *Brown v. Cheatham*, 91 Tenn. 97, 17 S. W. Rep. 1033; *Downs v. Allen*, 10 Lea (Tenn.), 66.

from making valid contracts of marriage without the consent of their master, yet, if they married with such sanction, the marriage was deemed valid and binding so far as the right or power of the parties to dissolve it by mutual consent was concerned.¹ And where a master married his slave, it was held that she thereby became emancipated.²

§ 60. Slave marriages — Curative legislation — Effect of. In most or all of the southern states, just after the civil war, laws were enacted providing, substantially, that “the parties shall be deemed to have been lawfully married as man and wife at the time of the commencement of cohabitation, although they may not have been married in due form of law.” And those who had previously cohabited as man and wife while slaves were required to make some public and formal declaration of their assent to the marital relation, in which instances the marital status of the parties related back to the beginning of the cohabitation.³ These acts of the various state legislatures were doubtless prompted, to a large extent, by the fact that the state of the law concerning marriages *per verba de præsenti*, as well as the status of marriages between slaves generally, was so uncertain and far from uniform, as well as by the alarming consequences of the doubtful legitimacy of the issue of slave marriages. These considerations made such laws imperatively necessary.⁴ Of course these curative acts made the marriages valid regardless of any prior invalidity.⁵ But the healing effect

¹ *Brown v. Cheatham*, 91 Tenn. 97, 17 S. W. Rep. 1033. See also *United States v. Route*, 33 Fed. Rep. 246.

² *Pearson v. Pearson*, 51 Cal. 120.

³ *State v. Harris*, 63 N. C. 1. This statute validated these marriages from the time of its passage, and the validity thus imparted to the marriage related back and took effect from the inception of the cohabitation. *State v. Harris*, 63 N. C. 1.

⁴ *Knox v. Moore*, 41 S. C. 355, 19 S. E. Rep. 683. Under an act of this kind in Tennessee it was held where a slave woman had contracted marriage after the custom of slaves, and so lived until emancipation, when the man married another negro

woman and was indicted for bigamy because of this second marriage, that he was incapable of making a marriage contract while a slave, and was free to repudiate his slave marriage upon being emancipated, and could, therefore, lawfully marry again. The court was further of the opinion, however, that if he had continued to live with the first wife after emancipation, the second marriage would have been void, and he would have been guilty of bigamy in contracting it. A similar rule is laid down by the Florida court. *Williams v. Kimball*, 35 Fla. 49, 16 S. Rep. 738.

⁵ *James v. Mickey*, 26 S. C. 270, 2 S. E. Rep. 130.

of these laws was confined strictly to past marriages. The negroes had been made citizens by the federal constitution, and they were, therefore, as capable of making contracts in the future as others.¹ These laws, recognizing the embarrassment which would follow in cases where a party had more than one husband or wife, after the custom of slavery, provided that when such was the case the husband might select which wife he would have, and this had to be done by a time certain. When the selection thus required was made, a new marriage ceremony had to be gone through, and certain officers were authorized to solemnize it. If this was not done, the option thus given was forfeited, and the status of the marriage had to be determined as though such law had not been passed.² But this species of legislation was meant to serve a good purpose: it was to purify the social condition of these people, not by any means to countenance any promiscuous or illicit commerce among the sexes without a marriage contract, however long such a state may have been kept up previously.³

§ 61. Slave marriages — Power of the parties to dissolve — Curative acts.—Where former slaves are living together in a supposed state of matrimony at the time of the passage of

¹ *Knox v. Moore*, 41 S. C. 355, 19 S. E. Rep. 683. Under these statutes it was held by the South Carolina court that a man and woman who married according to the custom among slaves in 1863 with the consent of their master, and had cohabited as such until after the passage of the law and until the death of the woman, were lawfully husband and wife, though the man had previously lived with another as his wife and had so lived after the passage of the law. *Knox v. Moore*, 41 S. C. 355, 19 S. E. Rep. 683.

² *Knox v. Moore*, 41 S. C. 355, 19 S. E. Rep. 683.

³ *Clement v. Riley*, 33 S. C. 66, 11 S. E. Rep. 699. A similar law was enacted in Georgia, providing where persons of color were, at the time of the passage of the law, living to-

gether as husband and wife, they became such to every legal purpose. And where a man had two reputed wives, or a woman two reputed husbands, the right of selection, with the consent of the one selected, was given, and when the selection was made the parties were to be formally married without unnecessary delay. Such selection was not itself a marriage. It was necessary that the ceremony be performed. This being true, such person might make such selection, live with the one selected for a time, then change and select the other, and have the requisite ceremony, and this would fasten the validity of the marriage in which the ceremony was had, and forever annul the other. *Comer v. Comer*, 91 Ga. 314, 18 S. E. Rep. 300.

these curative acts which confer the civil rights and impose the civil liabilities of married persons, the status thus imposed by law cannot be changed at the will or caprice of the parties or either of them. This is true though they separate permanently by mutual agreement and each marry again. The relation of husband and wife remains, and the wife may sue to recover for any wrong to her husband, though he may have married another, just as though they had been lawfully married from the beginning, and though no separation or other marriage had been contracted.¹ In Ohio, however, it has been held that if a slave who has been married before emancipation, marries another on being set free, his action in so doing is practically a repudiation of, and divorce from, the first union, and the rights of the wife of such first marriage cease, and those of the new one attach, upon the consummation of the second marriage.²

§ 62. Slave marriages — Curative acts — Death of one of the parties.—The curative acts passed to validate marriages between slaves have reference only to instances where the parties to the supposed marriage are living. If either or both are dead, the law has no effect whatever upon the marriage, imposes no civil nor marital responsibilities, and does not legitimate the issue, no matter how long the illegal relation may have been kept up.³

§ 63. Slave marriages — Curative acts — Rules of construction.—The purpose of these curative acts being to improve the domestic and social condition of those for whom they are enacted by prescribing their actual status before the law

¹ Thomas v. East Tenn., Va. & Ga. Ry. Co., 63 Fed. Rep. 420.

² McDowell v. Sapp, 39 Ohio St. 558. This case does not seem to rest upon any curative act, but rather announces the rule that marriages among slaves are not valid by reason of their inability, in such a state, to contract matrimony. When the emancipated slave in this instance first became empowered to make a contract, he made one inconsistent

with his former illicit state. This being true, and he being now authorized to contract, the marriage made after emancipation was valid, and, this one being valid, the one made when he could not lawfully bind himself by contract necessarily failed. Butler v. Butler (Ill.), 44 N. E. Rep. 203.

³ Andrews v. Simmons, 68 Miss. 732, 10 S. Rep. 65; Hereford v. Robb (Miss.), 19 S. Rep. 201.

both as to property and other rights, the courts give them a liberal construction. This is more fully to insure the wholesome objects of these laws.¹ By an early statute in New York, marriages between parties, one or both of whom were slaves, were made valid and the offspring legitimate. Under this law, where a free woman married a slave, it was held that the children took the status of the mother and were therefore free, and that the marriage with the slave did not have the effect of either enslaving the woman or bastardizing the issue of the marriage, nor, on the other hand, did it emancipate the husband.²

§ 64. Slave marriages — Curative acts — Rule in Texas. By a provision of the constitution of Texas³ it is laid down that children of slaves who, prior to emancipation, had lived together as husband and wife until the death of one of the parties, should be deemed legitimate to all purposes. But by this law a cohabitation between a man and woman who had lived together as slaves, who so lived together to the time of adoption of the constitution and continued after being emancipated, always recognizing each other as man and wife, does not amount to a valid marriage.⁴ But a marriage will be valid under this constitutional provision where the slaves had cohabited as man and wife, and so continued to do with the consent of their master and until after emancipation.⁵ And if the constitution had made no provision on the subject, a marriage between persons of the African race *per verba de præsenti*, it seems, would supply legislation on the subject and constitute a valid marriage.⁶

§ 65. Slave marriages — Common-law rule concerning.— According to the best considered cases, as well as on the ground of principle and good reasoning, marriages between persons in a state of slavery, especially if entered into according to the habits and customs among persons in this state, are valid

¹ Scott v. Lairamore (Ky.), 32 S. W. Rep. 172.

² Marbleton v. Kingston, 20 Johns. 1.

³ Art. 12, § 27, Const. Texas, 1889.

⁴ Livingston v. Williams, 75 Tex. 653, 13 S. W. Rep. 172.

⁵ Cumby v. Garland, 6 Tex. Civ. App. 519, 25 S. W. Rep. 673.

⁶ Cumby v. Garland, 6 Tex. Civ. App. 519, 25 S. W. Rep. 673.

and binding where the contract does not conflict with the allegiance of the slave to his master. If the master did not object, no one else was in a position to do so; and such marriages were usually recognized as good if they would have been valid at common law but for the institution of slavery.¹

§ 66. Statutory requirements as to formalities — Effect of a disregard of.—In many, and doubtless all, of the states, there are statutes prescribing certain formalities for contracts of marriage. These are, usually, that a license from a named officer be first procured, or that banns be published in a prescribed way; that consent of the parents or guardian be had, or other requirement of a like nature. The general rule in all such cases is, the marriage, though entered into in disregard of such requirement, will be good and valid if it would have been so in the absence of statutory restriction, unless the local law expressly and unequivocally makes all such marriages void for a failure to comply with the requirements and formalities. Nor will the fact that certain officers or persons in holy orders, who are authorized by statute to celebrate marriages when the law is complied with, become amenable to the criminal laws for celebrating marriages in defiance of the statutory formalities, invalidate the marriage or change the rule in the least.² So, where a statute provided that “no marriage shall be solemnized without a license issued by the judge of probate in the county in which the female resides,” a marriage *per verba de præsenti* is nevertheless valid, as the statute does not expressly provide that the marriage is to be void upon a failure to comply with its requirements.³ So, too, where parties have been

¹ Andrews v. Page, 3 Heisk. (Tenn.) 653; Wallace v. Godfrey, 42 Fed. Rep. 812. The same rule is recognized in Kentucky, where these marriages are likened to those among the Indian tribes celebrated according to their own customs. Brown v. Maghee, 12 Bush (Ky.), 428; Scott v. Lairamore (Ky.), 32 S. W. Rep. 172.

² Parton v. Hervey, 1 Gray (Mass.), 119; Catterall v. Sweetman, 9 Jur. 951; Teter v. Teter, 101 Ind. 129; Hargroves v. Thompson, 31 Miss. 211; Cat-

terall v. Sweetman, 1 Rob. Ecc. 304; Rundle v. Pegram, 49 Miss. 751; Dickerson v. Brown, 49 Miss. 357; Mathewson v. Phoenix Iron Foundry, 20 Fed. Rep. 281, 283, 284; Hallett v. Collins, 10 How. (U. S.) 174; Bowman v. Bowman, 24 Ill. App. 165; Askew v. Dupree, 30 Ga. 173; Rex v. Birmingham, 8 Bar. & Cr. 29; Pearson v. Howry, 6 Halst. (N. J.) 12; Park v. Barron, 20 Ga. 702; Lacon v. Higgins, 3 Stark. 643; 2 Kent, Comm. 90, 91.

³ Campbell v. Gullatt, 43 Ala. 577.

regularly divorced, but the local law forbids the one or the other to contract matrimony during the life of the other, or other named period, yet a marriage contracted in disregard of the directions of the law in this respect will be valid, though the person contracting it in violation of the law thereby subjects himself to heavy penalties.¹ And a marriage which is celebrated in statutory form will not be invalidated by reason of the fact that the officer issuing the license, being the holder of two offices, signs his name in the wrong capacity by mistake.²

§ 67. Indian marriages — Their right to prescribe their own regulations as to marriage.— So long as the Indians of North America maintain their tribal relations, they are a distinct race or nationality of people, in a sense foreigners, and they are given the power to regulate their marriages and the forms and requirements thereof. Such matters are exclusively within the province of the laws, customs and regulations of the Indians themselves in their tribal relation and government. And these — not the state laws — must govern the validity or invalidity of marriages of the members of these tribes.³

§ 68. Indian marriages — No ceremony required.— Generally speaking, under the customs in vogue among the Indians, there is no ceremony of any particular kind required in order to create a valid marriage. No intervention of a civil officer or of one in holy orders is necessary, and the publication of banns is unknown among them or their laws and customs in this respect.⁴ The marriage between the members of the Cherokee tribe, according to the usages and customs of

¹ Cohn v. Cohn (Kan.), 42 Pac. Rep. 1006; Stephenson v. Gray, 17 B. Mon. (Ky.) 193; Park v. Barron, 20 Ga. 702; Bishop, Mar., Div. & Sep., § 286; Holder v. State (Tex. Civ. App.), 29 S. W. Rep. 793; Chapman v. Chapman (Tex. Civ. App.), 32 S. W. Rep. 564; Crawford v. State (Miss.), 18 S. Rep. 848; Gardner v. Manchester (Me.), 33 Atl. Rep. 990.

² Foster v. State, 31 Tex. App. 409, 20 S. W. Rep. 823. A different hold-

ing has recently been made in Vermont (Ovitt v. Smith (Vt.), 33 Atl. Rep. 769), and probably elsewhere; but it is believed that the great weight of authority, as well as much the better reason, is with the rule as announced in the text.

³ Earl v. Godley, 42 Minn. 361, 44 N. W. Rep. 254; Kobogum v. Jackson Iron Co., 76 Mich. 498, 43 N. W. Rep. 602.

⁴ Johnson v. Johnson, 30 Mo. 72.

which all that is necessary is for the parties to live together as man and wife, is valid everywhere.¹ Nor is the extension of the jurisdiction of a state over the territory occupied by the Indians any barrier to contracts of this nature so long as the Indians themselves maintain their tribal relations.² In harmony with this doctrine it is held that a marriage between members of an Indian tribe, though residing in one of the states, which was consummated by the husband sending a message to the parents of the girl, with presents which were accepted and the marriage agreed upon by all the parties, and in pursuance of which the girl left her parents and lived with her husband as his wife, being all that is required by the customs of the tribe, constitutes a good marriage.³ The residence of the Indian tribes within the boundaries of a state does not make them citizens of such state nor subject them to its laws in reference to their marriage customs or domestic government.⁴

§ 69. Indian marriages — Power of the states to regulate. While the federal congress has the power to enact laws regulating the actions of the Indians within the United States, the states themselves have no power to interfere with any of their customs or laws, and cannot in any way affect the validity of a marriage made in accordance with the laws and customs of the Indian tribes, where such marriage is not with a citizen of the state, so long as the tribal relation between the Indians is kept up. Their marriages and other domestic laws and customs, so far as the Indians themselves are concerned, are bind-

¹ *Morgan v. McGhee*, 5 Humph. (Tenn.) 13.

² *Wall v. Williamson*, 8 Ala. 48.

³ *Boyer v. Dively*, 58 Mo. 510.

⁴ *Dole v. Irish*, 2 Barb. 639; *Jones v. Laney*, 2 Tex. 342; *United States v. Shanks*, 15 Minn. 369; *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. Rep. 1109. Contrary to the better rule, as well as the pronounced weight of authority, however, it is held in Indiana, where, by statute, *all* marriages contracted in that state must be in obedience to, and accord-

ance with, the requirements of the local laws, that a marriage between a male and a female of the Miami tribe of Indians is not valid in that state, though contracted strictly in accordance with the laws and requirements of the tribe. The court seemed of the opinion that these Indians were not a nation or independent people between whom and the people of the state the principles of international law could be enforced. *Roche v. Washington*, 19 Ind. 53.

ing on all the world when not in conflict with some act of congress or treaty with the federal government.¹

§ 70. Indian marriages — Power of husband to annul.— When, by the laws of the Indian tribes, the husband may dissolve the marital relation at pleasure, the exercise of this option by the husband has the effect of completely sundering the marriage tie, as effectively as though done by a court of competent jurisdiction. This is a noticeable distinction in the law of marriage among the Indians when contrasted with that of the whites.² Nor is this fact any ground for holding these marriages invalid.³ And such marriages are not contrary to the laws of nature because not permanently binding.⁴ It simply amounts to a material difference in the laws concerning marriages with the Indians and those governing the marriages of white persons — a thing of little or no concern to the Indians. The Indian husband, therefore, having the right under these laws to divorce himself at pleasure, it follows necessarily that he has, when he has thus divorced himself, the right to again marry, and in fact his marrying again is tantamount to a renunciation of the first marriage, and will be so treated in law.⁵

§ 71. Indian marriages — Effect of on property of the wife. By the customs of these Indian tribes, which is frequently the case, the husband, contrary to the rule at common law, takes no part of the wife's property; nor is she, by reason of the marriage, as at common law, shorn of any right to make contracts in any sense. She retains all her property, and may manage it regardless of her husband or his authority.⁶ This being true, it would necessarily follow that the Indian husband would take no estate by the curtesy in any of his wife's lands by virtue of the marriage.

§ 72. Indian marriages — Competency of wife to testify against the husband.— Ordinarily, where marriages among

¹ United States v. Kagama, 118 U. S. 375, 6 Sup. Ct. Rep. 1109; Blue Jacket v. Board of Com'rs, 72 U. S. 737; United States v. Holliday, 70 U. S. 407; Fellows v. Denniston, 72 U. S. 761; Worcester v. State of Georgia, 6 Pet. 515.

² Wall v. Williamson, 8 Ala. 48;

Johnson v. Johnson, 30 Mo. 72; La Riviere v. La Riviere, 77 Mo. 512.

³ Johnson v. Johnson, 30 Mo. 72.

⁴ La Riviere v. La Riviere, 77 Mo. 512; Johnson v. Johnson, 30 id. 72.

⁵ Campo v. Jackson Iron Co., 50 Mich. 580, 16 N. W. Rep. 295.

⁶ Wall v. Williamson, 8 Ala. 48.

the Indians have been contracted after the manner in vogue with these people, the relation of husband and wife is established, and this being true, the husband and wife, in the absence of an enabling statute, could not testify for or against each other. But in North Carolina, in the case of a marriage of members of the Cherokee tribe after their customs, it was held invalid because the Indians in question were, at the time of the alleged marriage, residents and citizens of the state.¹ But even where the state law denies the validity of these marriages, it is only as to the citizens of the state, not as to the private domestic policy of the Indians.² And this is the rule though one of the parties to the marriage be a white person.³

§ 73. Indian marriages — Whites and Indians — Status of marriages between.—The general rule is that the marriage of a white person with an Indian and a cohabitation in pursuance thereof in accordance with the customs of the Indians, with acknowledgment by the parties of each other as husband and wife, will be sufficient. And of course the offspring of a marriage thus consummated would be legitimate for all purposes.⁴ Nor is it necessary that such a marriage be celebrated within the bounds of an Indian reservation or other lands allotted to the Indians, or that the parties after the marriage live upon such reservation or allotted lands.⁵ The white person thus marrying an Indian, and taking up his abode with

¹ *State v. Ta-cha-na-tah*, 64 N. C. 614. In this case the question as to the validity of the marriage arose upon the wife being produced by the state as a witness against the defendant, who had violated the criminal laws. As the Indians in this particular instance were a scattered part of the tribe, who had been adverse to moving west of Mississippi, and by reason of the treaty of December 29, 1835, between the United States and the Cherokee Indians were permitted to remain and become citizens of the state of North Carolina, it was held that they were subject to its laws.

² *Wilber v. Bingham*, 8 Wash. 35, 35 Pac. Rep. 407.

³ *Wilber v. Bingham*, 8 Wash. 35, 35 Pac. Rep. 407.

⁴ *First Nat. Bank v. Sharp* (Tex. Civ. App.), 33 S. W. Rep. 676; *Wilber v. Bingham*, 8 Wash. 35, 35 Pac. Rep. 407.

⁵ *La Riviere v. La Riviere*, 97 Mo. 80, 10 S. W. Rep. 840; *Boyer v. Dively*, 58 Mo. 529. In a late case in Arizona it is held, by a divided court, that a marriage by a white person with an Indian is void. *In re Walker's Estate* (Ariz.), 46 Pac. Rep. 67. The marriage in this case, however, seemed to hinge on a statutory enactment of the territory which the court seems to have felt impelled to follow. A like ruling has been made in Wash-

them, becomes a part and parcel of the tribe, just as one renouncing his allegiance to one country adopts the habits, laws and customs of another and submits himself thereto.

§ 74. Validity of marriages between negroes and white persons.—In many of the states laws have been passed, either by constitutional enactment or statutory provision, forbidding, under severe penalties, as well as the consequences of absolute nullity, all marriages between white persons and those of the African race. The object of such laws is manifest. It is to keep pure and unmixed the blood of the two races, to the end that the paramount excellence of the one may not be lowered by an admixture with the other. It is to promote the superior and general excellence of the white race and preserve to society the incident benefits of the better condition of things. Such laws are not in violation of the thirteenth amendment to the constitution of the United States, forbidding any state to make or enforce a law which shall abridge the privileges or immunities of the citizens of the United States, or deny to any person within its jurisdiction the equal protection of the laws, nor the act of congress¹ providing that all persons born within the United States, not subject to any foreign power, are citizens; and such citizens, of every race and color, shall have the same right in every state and territory in the United States to make and enforce contracts, and to the full and equal benefit of all laws for the security of person and property, as is enjoyed by white citizens, any state law to the contrary notwithstanding.²

ington in the absence of statute. *Wilber v. Bingham*, 8 Wash. 35, 35 Pac. Rep. 407; *Follansbee v. Wilber* (Wash.), 44 Pac. Rep. 262; *In re McLaughlin's Estate*, 4 Wash. 570, 30 Pac. Rep. 651; *Kelly v. Kitsapp Co.*, 5 Wash. 521, 32 Pac. Rep. 554. But the better rule is doubtless to the contrary. This rule cannot be supported without undermining the well-established principle that these Indians have the right to ordain their own marriage laws, and when they are married in observance of them

they are married to all purposes everywhere.

¹ Act of Cong., April 9, 1866.

² *Succession of Coldwell*, 34 La. Ann. 264, 266; *Ellis v. State*, 42 Ala. 525; *State v. Gibson*, 36 Ind. 389; *Frasher v. State*, 3 Tex. 389; *Lonas v. State*, 5 Heisk. (Tenn.) 287; *Green v. State*, 58 Ala. 191, overruling the earlier case of *Burns v. State*, 48 Ala. 195; *Kinney v. Commonwealth*, 30 Gratt. (Va.) 858; *Francois v. State*, 9 Tex. App. 144; *Dodson v. State*, 61 Ark. 57, 31 S. W. Rep. 977; *In re*

§ 75. **Status of marriages between white persons and negroes.**—Where it is provided by law that all marriages between white persons and negroes shall be null and void, the status of those who attempt to marry in violation of such laws is simply that of those who have attempted to contract a marriage into which they cannot enter. It is no more valid than a marriage with a lunatic or a marriage between persons of the same sex. No civil or other liabilities grow out of such a relation; no duty between the parties nor with the outside world arises; no legitimacy can be imparted to the offspring, and no inheritance be claimed by reason thereof, either by the children or by either of the parties, any more than could be in the case of any unlawful or illicit sexual relation. Such a state is odious to the law, and its assistance will not be lent towards the assertion of any right claimed by any one by reason of such a marriage.¹

§ 76. **Miscegenation — Conflict of laws.**—The laws of a state against miscegenation are absolutely controlling. They become the public policy of the sovereignty, and that policy does not yield itself to the policy of any other state or country in conflict with it. The marriage of a white person with an African, though in a state or country where it is recognized as valid, will never be enforced or upheld in a state whose public policy it manifestly violates.²

Hobbs, 1 Woods, 537; Pace v. State, 69 Ala. 231; Stewart, Mar. and Div., § 157; Pace v. Alabama, 106 U. S. 583, 1 Sup. Ct. Rep. 637.

¹ Hoover v. State, 59 Ala. 57; Dodson v. State, 61 Ark. 57, 31 S. W. Rep. 937; Bailey v. Fisk, 34 Me. 77; State v. Kennedy, 76 N. C. 251; Scott v. State, 39 Ga. 321; Dupree v. Boulard, 10 La. Ann. 411; State v. Hooper, 5 Ired. (N. C.) 201; State v. Fore, 1 Ired. (N. C.) 378; Kinney v. Commonwealth, 30 Gratt. (Va.) 858; State v. Brady, 9 Humph. (Tenn.) 74.

² Dupree v. Boulard, 10 La. Ann. 411; Kinney v. Commonwealth, 30 Gratt. (Va.) 858; State v. Bell, 7 Baxt. (Tenn.) 9. The defendant in this

case was indicted for a violation of the statute. He was a white man, and it was contended on his part that, though he had been living with the negro woman as his wife, as he married her in Mississippi, where such marriages were tolerated by law, and the marriage being valid there, he could not be punished for living in the state thus acquired after his removal to Tennessee. The learned court, speaking through Judge Turney, laid down the law in the following chosen language: "For the defendant, the case of Morgan v. McGhee, 5 Humph. (Tenn.) 13, is relied on. That case only decides that marriages solemnized according

§ 77. Statutes forbidding marriage between negroes and white persons — Rule of construction.— While these statutes might, in civil cases, receive a liberal construction, to the end that the policy of the state with reference to such might not be defeated, yet in criminal instances the familiar canon of a strict construction must prevail. It is accordingly held under a statute providing that “if any man or woman shall intermarry with a negro, mustee or mulatto, man or woman, or any person of mixed blood, bond or free, to the third generation inclusive, such and every person so offending shall be liable to a penalty,” etc., and that, “if any white man or woman shall presume to live with any negro, mustee or mulatto, man or woman, as man and wife, each and every of the parties so offending shall be punished,” etc., that the penalties were directed only against the white person, and that a negro could not be indicted for marrying a white woman, though by the terms of the statute the marriage would be void.¹

§ 78. License — Want of — Effect.— The fact that parties enter into the marriage contract without first procuring the

to the law and usages of the country where made are good in Tennessee. It is the manner and form of marriage, and not the capacity of the parties to contract the marriage, which was passed upon. The reason for such rule is readily seen. Each state has its peculiar regulation — some more, some less, strict and formal. The general rule resulting from all — that a marriage good in the place where made, after the forms and usages of that place, shall be good everywhere — is intended to prevent a mischief that would otherwise grow out of a difference of formal and local regulations. . . . Each state is sovereign, a government within, of and for itself, with the inherent and reserved right to declare and maintain its own political economy for the good of its citizens, and cannot be subjected to the recognition of a fact or act contravening its public policy and against good morals, as lawful, because it

was made or executed in another state having no prohibition against it, or even permitting it. Extending the rule to the width asked for by the defendant, and we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a state or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.” It is believed that this expression of the law is thoroughly sound. See, however, as apparently *contra*, Succession of Cabellero, 24 La. Ann. 573; Pearson v. Pearson, 51 Cal. 120.

¹ State v. Brady, 9 Humph. (Tenn.) 74.

license required by statute or the local law will not have the effect of invalidating the marriage, unless the law expressly declares all marriages without license void. Nor will the fact that the parties disregard the requirements of the law in omitting to first obtain the license affect the validity of the marriage in the least, though by so doing they render themselves amenable to the criminal law. The punishment prescribed is meant for an atonement for the wrong to the state by violating its laws, not the annulment of a contract the parties had a right to make.¹ Nor will the fact that the license is issued from a county other than that in which the ceremony is actually performed affect the validity of the contract.²

§ 79. Who may officiate at celebration of.—Where under the law it is required that a marriage be celebrated by an ordained minister of some religious denomination, the celebration may be by a deacon, where, by the rules of the religious sect to which he belongs, he must be ordained before he can exercise the office of a deacon.³ Nor is it required of those about to celebrate their marriage to search the records and trace the authority of the minister assuming to act as such. They are justified in presuming that a person in clerical garments, who is known to officiate as such, has been duly and regularly ordained to act.⁴

§ 80. Persons authorized to officiate — Officer officiating at his own marriage — Effect.—While an officer may be duly authorized by law to officiate at the solemnization of marriages, he has no authority to so officiate at his own, but this must be

¹ *Connors v. Connors* (Wyo.), 40 Pac. Rep. 966; *State v. Parker*, 106 N. C. 711, 11 S. E. Rep. 517; *Haggin v. Haggin*, 35 Neb. 375, 53 N. W. Rep. 209; 1 Bl. Comm. 437; *Londonnery v. Chester*, 2 N. H. 268.

² *Cummings v. State* (Tex. Cr. App.), 36 S. W. Rep. 442.

³ *State v. Parker*, 106 N. C. 711, 11 S. E. Rep. 719.

⁴ *Patterson v. Gaines*, 6 How. (U. S.) 550. But a marriage celebrated in a distant state will not be presumed

to have been celebrated by a justice of the peace or other officer with due authority, where he merely affixed to his name the letters "J. P. C. Co. Ga." *Miller v. Miller* (S. C.), 21 S. E. Rep. 254. If the minister is not actually ordained as required by law, the marriage will nevertheless be good if the parties afterwards abide by it. *Holder v. State* (Tex. Cr. App.), 29 S. W. Rep. 793. Otherwise if they repudiate it. *Ashley v. State* (Ala.), 19 S. Rep. 917.

done by some one not a party to the agreement.¹ Nor can a minister or officer delegate to another his authority to solemnize matrimony.²

§ 81. Status of marriage where minister has, in violation of law, celebrated the contract between infants who have not attained the age required by law.—A civil or religious officer authorized by law to solemnize marriages is authorized to do so between those only who are competent, under the law, to marry. But the fact that the minister violates the law will not invalidate the marriage. Accordingly, it is usually provided that a violation of his duty in this respect will subject him to criminal punishment. But if, in violation of the law, he nevertheless celebrates a marriage between infants without the consent of the parents, or the procuring of license or the publication of banns, the unlawful act would subject him to the penal consequences thereof; but the fact that he may subject himself to punishment under the criminal laws will not affect the validity of the marriage.³

§ 82. Status of marriage where minister or officer officiates beyond his jurisdiction.—A civil officer authorized to solemnize marriages has no authority to officiate in a place without his jurisdiction. And an attempt to so do beyond such jurisdiction will have no legal effect and lend no validity to the marriage.⁴ But a marriage under these circumstances will be valid regardless of the want of authority in the officer to act, if the parties afterwards recognize the marriage and live together. At least, this would be true in all jurisdictions where common-law marriages are recognized.⁵ But a justice of the peace may celebrate a marriage anywhere in his state where, by statute, “every justice of the peace of this state and every state, and every ordained minister of the gospel, shall be and is hereby authorized and empowered to solemnize marriages between such persons as may lawfully enter into the same.”⁶

¹ *Beamish v. Beamish*, 9 H. L. 274.

⁴ *Bashaw v. State*, 1 Yerg. (Tenn.)

² *Ashley v. State* (Ala.), 19 S. Rep. 177.

³ *Hiram v. Pierce*, 45 Me. 367; *Par-*

ton v. Hervey, 1 Gray (Mass.), 119;
² *Kent*, Comm. 90, 91; *Milford v. Wor-*
cester, 7 Mass. 48.

⁵ *Simon v. State*, 31 Tex. App. 186,
20 S. W. Rep. 399.

⁶ *Pearson v. Harvey*, 6 Halst. (N. J.)
12. Nor is it a crime for one not
authorized by law to celebrate mar-

§ 83. Common-law marriages—Council of Trent.—The Council of Trent, composed chiefly of ecclesiastical dignitaries and members of the Roman Catholic Church, was held in the sixteenth century. Its purposes were spiritual in name, and perhaps temporal, in some respects, in effect. The important act of this council, with reference to the subject of marriage, was the passage, on November 11, 1563, of the decree making null and void all marriages thereafter to be contracted which were not celebrated before the parish or some other priest, or by license of the ordinary, or before two or more witnesses.¹ This interference with matters matrimonial, however, has not met with very general approval except in some countries where the sway of the Roman Church is great. And a distinguished text-writer refers to the passage of these decrees concerning marriage “as an ecclesiastical device, whose object was to suppress dissent and compel submission to the Papal See.”² In this country it certainly is not within the power of any ecclesiastical body to affect the civil status of married persons, or lay down requirements that must be complied with upon pain of nullity. Nothing short of the supreme power of the state can effect this.³ This being true, it necessarily follows that the decrees or edicts of the Council of Trent laying down certain requirements as necessary to the validity of marriages can have no effect on marriages in this country contracted in disregard of its requirements.

§ 84. Common-law marriages—Requisites and validity.—According to the common law of Europe, based chiefly on the civil law prior to the Council of Trent, the marriage contract was looked upon as of a merely consensual nature, differing only from other contracts by being absolutely indissoluble in its nature even with the consent of the parties. In form, a con-

riages to assume to act in this capacity where the parties are capable of marrying and freely give their consent. *State v. Brown* (N. C.), 25 S. E. Rep. 820.

¹ *Hallett v. Collins*, 10 How. (U. S.) 174.

² Wharton, *Conf. Laws*, § 171.

³ *Hallett v. Collins*, 10 How. (U. S.)

174. Though the decree of this council, with reference to marriage, became the law of Spain, yet it never invaded America, even while the early Spanish colonies in this country were under the dominion of Spain. *Patton v. Philadelphia*, 1 La. Ann. 98; *Hallett v. Collins*, 10 How. (U. S.) 174.

tract *per verba de præsenti*, or a promise *per de futuro cum copula*, constituted a valid and binding marriage. The intervention of any one in holy orders was not required until the decrees of the Council of Trent were promulgated, according to which the intervention of the parish priest was required to give validity to the marriage. The promise *per verba de futuro*, followed by sexual intercourse in furtherance of such contract, was considered in law as tantamount to the contract *per verba de præsenti*. In the matrimonial law administered by the canonists, it was a maxim, *consensus non concubitus facit nuptias*, and this is still the law in some parts of Europe where the civil and canon laws are in force and where the decrees of the Council of Trent have not been adopted by the municipal law, as, for instance, in Scotland.¹ At the Reformation the dominion of the Roman Catholic Church was disclaimed in England, and the decrees of the Council of Trent renounced, so far, at least, as marriages in that country were concerned, though the rules of the common law, which had their origin in the natural and civil contract of marriage, aside from a religious sacrament, were retained.²

§ 85. Common-law marriages—Rule as to their validity in England prior to the Council of Trent.—It is a question of much difficulty whether a marriage *per verba de præsenti*, followed by cohabitation and mutual recognition of the parties in pursuance thereof, constituted a valid marriage in this country prior to the Council of Trent. The decisions of the courts there seem to be in irreconcilable conflict. The case of *Queen v. Millis*,³ while apparently a leading case, decides practically nothing, though the official report of the case fills about three hundred pages. It was decided in 1843, and has perhaps served to enshroud the question in more doubt than ever existed before. It arose upon an indictment of the defendant under the criminal laws of England, and the pivotal question was the validity of a marriage *per verba de præsenti*, followed by cohabitation in pursuance thereof. The court below was divided

¹ Denison v. Denison, 35 Md. 361; ² Dalrymple v. Dalrymple, 2 Hag. Hallett v. Collins, 10 How. (U. S.) Con. 54.
174; Dalrymple v. Dalrymple, 2 Hag. ³ 10 C. & F. 534.
Con. 54.

on the question; and, to get the ruling of the House of Lords, rendered a formal judgment acquitting the prisoner, which was, in effect, holding the marriage invalid. On appeal, after exhaustive argument and great deliberation, the Lords were equally divided, and for this reason the case was affirmed. In *Catherwood v. Calson*¹ a similar question was presented, and Baron Parke was of the opinion that the case of *Queen v. Millis*, having affirmed the lower court, though the Lords were equally divided, necessarily established the invalidity of such marriages. The same conclusion was reached in *Beamish v. Beamish*.² And in another case it was decided that a marriage between British subjects, not celebrated by some person in holy orders, was invalid at common law in England.³ In the case of *Catteral v. Sweetman*⁴ the validity of a marriage in the colony of New South Wales came up for determination. An act of this colony to fix the status of marriages within its borders provided that in case of marriages between persons, one or both of whom were members of the Presbyterian Church of Scotland or the Roman Catholic Church, one or both were required to sign a declaration in writing that they or one of them was a member of one or the other of said churches, which marriage should be celebrated within the colony by a regularly-ordained minister of one of these churches, and should then have the same effect as a marriage solemnized by a clergyman of the Church of England. It was held that, as this statute did not declare marriages not conforming to its requirements void, a marriage between persons in the colony without the intervention of a clergyman of the Church of England, and neither being members of either the Roman Catholic or Presbyterian Church, was valid. The case of *Queen v. Millis* was vigorously pressed upon the court against this conclusion, but without avail.⁵ The learned Mr. Wharton contends that in

¹ 13 M. & W. 259.

² 9 H. L. 274.

³ *Dumoulin v. Druitt*, 13 Ir. Com. Law, 212. The court in this case, too, seems to have reluctantly yielded to the authority of the case of *Queen v. Millis*, 10 C. & F. 534.

⁴ 9 Jur. 951.

⁵ *Catteral v. Catteral*, 11 Jur. 914.

In this case Dr. Lushington said: "I am not disposed to make the decision of *Queen v. Millis* any authority further than it goes, for two reasons: First, the law lords were divided, and it was only in consequence of the form in which the case came before them that it could be considered a judgment at all. In the next place,

England consensual marriages were valid prior to the time of Lord Hardwicke's Act in the twenty-sixth year of the reign of George III.¹ It would seem to follow from the best reasoning, as well as authority, that marriages in England before the statutory changes took place were valid and binding when entered into *per verba de præsenti* and followed by cohabitation and recognition by the parties to the contract.²

§ 86. Common-law marriages — Relation of the common law to the canon law with reference to marriage.—The canon law of Europe governing the married relation has been adopted by all Christian countries. It takes its source from the councils at which it was established, which were, in effect, international congresses of all the Christian powers of Europe. These dealt with private or domestic law as distinguished from public. Every nation of Christian Europe attended either in person of the sovereign or some one directly delegated to rep-

and for a reason equally as strong, that, throughout the whole of our colonies, at various times and various places, if I were to hold that the presence of a priest in holy orders of the Church of England was necessary to the validity of marriages, I should be going to the length of depriving thousands of married couples of a right to resort to this court for such benefit as it can give in cases of adultery or cruelty."

¹ Wharton, *Conf. Laws*, § 172, note 2. In alluding to the case of *Queen v. Millis* he says: "It is clear that a decision, balanced as was this, could have but slight authority in the United States against the mass of our own decisions which give a contrary interpretation to the English law. Even in England it seems to have had but little practical weight. The House of Lords, before whom the case came in 1844, consulted the common-law judges, who unanimously advised the affirmance of the judgment; omitting, however, through some inadvertence, to consult the ecclesiastical judges, to whose prov-

ince this branch of the law peculiarly belongs."

² *Northey v. Cocke*, 2 Add. Ecc. 294; 1 Bl. Com. 437; *Clayton v. Wardell*, 4 N. Y. 230; *Wigmore's Case*, 2 Salk. 438; *Steadman v. Powell*, 1 Add. Ecc. 58; *Hervey v. Hervey*, 2 W. Bl. 877; *Dalrymple v. Dalrymple*, 2 Hag. Con. 54; *Catteral v. Sweetman*, 9 Jur. 951; *Catterall v. Catteral*, 11 Jur. 914; *King v. Inhabitants of Hodnett*, 1 T. R. 96. By the Marriage Act of England, passed in 1823, it was provided that if any person should marry in any place other than a church, or such chapel where the banns of matrimony might lawfully be published, or should knowingly or wilfully intermarry without due publication of banns or license from a person having authority to grant the same, such marriage should be null and void to all intents and purposes whatsoever. This law, of course, changes the rule of the common law, as all marriages not celebrated in accordance with its requirements are stamped by the act as null and void.

resent his particular state or country. In order to carry any measure before this council, it was necessary to have a majority of states, not alone of votes. From this canon law, thus ushered into existence with the unified consent and indorsement of all the principal European countries, is the common law concerning marriage taken. It formed the basis of the common law of this country where not changed by statute. While it was not binding on any country until ratified by the sovereign authority, it was, however, ratified by all the powers without an exception, and has since been a part and parcel of the common law, not only of England, but of all Christendom as well.¹

§ 87. **Common-law marriages — Requisites.**— The present consent and agreement being the gist of a marriage *per verba de præsenti*, it is not essential to the validity of such a marriage that cohabitation follow.² No set form of words is necessary. Any words or acts which clearly show an assumption of the relation and a recognition thereof by the parties will be deemed sufficient.³ Nor need the contract be in writing to be binding.⁴ While it is not necessary that a common-law marriage be in the presence of witnesses, or that any ceremony be performed other than the agreeing upon the contract, yet it is not sufficient to agree upon a present cohabitation and a future marriage.⁵ It is required that the cohabitation be as man and wife and in pursuance of the marriage contract. It can, of itself, be no part of a marriage contract except it take place after, not before, the agreement.⁶ “A consent *de præsenti*,” says Lord Cottenham, “is essential to such a marriage, and a subsequent marriage is established by a proof of a promise and a *copula*, on the ground that the *copula* was a consequence and-

¹ Wharton, *Confl. Laws*, § 171.

² *Dumarsley v. Fishly*, 3 A. K. Marsh. (Ky.) 377.

³ *Bowman v. Bowman*, 24 Ill. App. 165; *Patterson v. Gaines*, 6 How. (U. S.) 550; *Fenton v. Reed*, 4 Johns. 51; *Caujolle v. Ferrie*, 26 Barb. 177; *Wigmore's Case*, 2 Salk. 437; *Hamilton v. Hamilton*, 9 C. & F. 327; *Hantz v. Sealy*, 6 Bin. (Pa.) 405.

⁴ *Mathewson v. Phoenix Iron Foundry*, 20 Fed. Rep. 281; *State v. Behrman*, 114 N. C. 797, 19 S. E. Rep. 220; 2 Greenl. Ev., § 463.

⁵ *Cartwright v. McGown*, 121 Ill. 888, 12 N. E. Rep. 737; 1 Bishop, Mar., Div. & Sep., § 262.

⁶ *Soper v. Hasley*, 85 Hun, 464, 38 N. Y. S. 105; *Farley v. State*, 94 Ala. 501, 10 S. Rep. 646.

performance of an anterior promise. The *copula* does not constitute the marriage, but it is taken, when circumstances justify it, as evidence of the performance of a previous promise. To assume it to be otherwise would be altogether to mistake its nature."¹

§ 88. Common-law marriages — Distinction between present and future contracts.— According to the common law, which is the basis of the common law of marriage with most European nations, a marked distinction is made between marriages *per verba de præsenti* and those *per verba de futuro cum copula*. As to the former, it is a marriage *ipso facto* independently of *copula*; while as to the latter, it is not a marriage until the *copula*, in performance and furtherance of the marriage contract, is had.² The one is an executory agreement, not becoming perfect until the consummation by cohabitation in pursuance thereof; the other is a present executed contract taking effect at once.

§ 89. Common-law marriages — General rule as to validity of.— In this country, at least, it is the general rule that, in the absence of some positive statute or special law to the contrary, any marriage regularly entered into according to the course of the common law by the mutual consent of the parties, and recognition of each other as man and wife, is valid for all purposes.³

¹ *Stewart v. Nenzies*, 8 C. & F. 309; *United States v. Tenney* (Ariz.), 11 Pac. Rep. 472; *Richard v. Brehm*,

² *McAdam v. Walker*, 1 Dow. 148; *73 Pa. St. 140*; *Carmichael v. State*, 12 Ohio St. 553; *Teter v. Teter*, 101 Ind. 129; *Maryland v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. Rep. 278; *Blanchard v. Lambert*, 43 Iowa, 228; *Cartwright v. McGowan*, 121 Ill. 388, 12 N. E. Rep. 737; *Bowman v. Bowman*, 24 Ill. App. 165; *Farley v. Farley*, 94 Ala. 501, 10 S. Rep. 646; *Beggs v. State*, 55 Ala. 108; *Campbell v. Gullatt*, 43 Ala. 57; *Hebblethwaite v. Hepworth*, 98 Ill. 126; *Stoltz v. Doering*, 112 Ill. 234; *State v. Bittick*, 103 Mo. 183, 15 S. W. Rep. 325; *Port v. Port*, 70 Ill. 484; *Dumarsley v. Fishley*, 3 A. K. Marsh. (Ky.) 377; *Donnelly v. Donnelly*, 8 B. Mon. (Ky.) 113

³ *Dannelli v. Dannelli*, 4 Bush (Ky.), 51; *Bailey v. State*, 36 Neb. 808, 55 N. W. Rep. 201; *Gibson v. Gibson*, 24 Neb. 324, 39 N. W. Rep. 450; *Jones v. Jones*, 29 Ark. 19, 21; *Meister v. Moore*, 96 U. S. 72; 2 Greenl. Ev., § 461; *Hutchins v. Kimmell*, 31 Mich. 126; *People v. Loomis* (Mich.), 64 N. W. Rep. 18; *Peet v. Peet*, 52 Mich. 464, 18 N. W. Rep. 220; *Kelen v. Brewer*, 1 Har. & McH. (Md.) 152; *Hantz v. Sealy*, 6 Bin. (Pa.) 405; *Parker's Appeal*, 44 Pa. St. 309; *Bricking's Appeal*, 2 Brewst. (Pa.) 202;

This rule is also recognized in Scotland.¹ There is no doubt, of course, that the legislatures of the various states may take away the common-law mode of contracting marriage, and impose certain other requirements. This would be a legitimate exercise of the police power. But the presumption always is, there is no such intention unless it be plainly expressed. "A statute may declare that no marriage shall be valid unless solemnized in the prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or clergyman, or that it be preceded by a license or by publication of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being as destructive of a common-law right to form the marriage relation by words of present assent."²

§ 90. Common-law marriages — Rule in California.— The statutes of this state require that, where parties are married without going through the ceremony provided by law, they

(see *Pearce v. Pearce* (Ky.), 16 S. W. Rep. 271; *Coleman v. Valmer* (Tex. Civ. App.), 31 S. W. Rep. 413; *Applegate v. Applegate*, 45 N. J. Eq. 116, 17 Atl. Rep. 293; *Pearson v. Howly*, 6 Halst. (N. J.) 12; *Clark v. Cassidy*, 64 Ga. 663; *Knox v. Moore*, 41 S. C. 355, 19 S. E. Rep. 683; *Livingston v. Williams*, 75 Tex. 653, 13 S. W. Rep. 173; *Dickerson v. Brown*, 49 Miss. 357; *Carson v. Carson*, 40 Miss. 349; *Hargrove v. Thompson*, 31 Miss. 211; *Rundle v. Pegram*, 49 Miss. 751; *Simon v. State*, 31 Tex. Cr. App. 186, 20 S. W. Rep. 399; *United States v. Route*, 33 Fed. Rep. 246; *Dyer v. Brannock*, 66 Mo. 391-423; *Holabird v. A. M. Ins. Co.*, 2 Dill. 167; *State v. Gonce*, 79 Mo. 600; *Cunningham v. Burdell*, 4 Bradf. 343; *Clayton v. Wardell*, 4 N. Y. 230; *Gall v. Gall*, 114 N. Y. 209, 21 N. E. Rep. 206; *Rose v. Clark*, 8 Paige, 574; *Bissell v. Bissell*, 55 Barb. 324; *Ferrie v. Public Adm'r*, 3 Bradf. 151; *Jenkins v. Bisbee*, 1 Edw. Ch. 877; *Jackson v. Winne*, 7 Wend. 47;

Hays v. People, 25 N. Y. 390; *Hicks v. Cochran*, 4 Edw. Ch. 107; *Cumby v. Garland*, 6 Tex. Civ. App. 519, 25 S. W. Rep. 673; *Ingersoll v. McWillie*, 9 Tex. Civ. App. 543, 30 S. W. Rep. 56; *Mathewson v. Phoenix Iron Foundry Co.*, 20 Fed. Rep. 281; *Holder v. State*, 35 Tex. Cr. App. 19, 29 S. W. Rep. 793; *Matney v. Linn* (Kan.), 54 Pac. Rep. 668; *State v. Hughes*, 35 Kan. 626, 12 Pac. Rep. 28; *State v. Walker*, 36 Kan. 297, 13 Pac. Rep. 279.

¹ *Montague v. Montague*, 2 Add. Ecc. 375; *White v. White*, 83 Cal. 427, 23 Pac. Rep. 276; *Dysart Peerage Case*, 6 App. Cas. 489.

² *Meister v. Moore*, 96 U. S. 76, 79; *Mathewson v. Phoenix Iron Foundry*, 20 Fed. Rep. 281; *Hargrove v. Thompson*, 31 Miss. 211; *State v. Bittick*, 103 Mo. 183, 15 S. W. Rep. 325; 2 Kent. Comm. 87; 2 Greenl. Ev., § 460. And see *Johnson v. Johnson*, 1 Cold. (Tenn.) 630; *Andrews v. Paige*, 3 Heisk. (Tenn.) 653.

must jointly make a declaration showing their names, ages and residence, the fact of marriage, and that the marriage has not been solemnized. But it is held in this state, where it is also provided by statute that consent alone, without mutual assumption of the marital status,¹ does not effect a valid marriage, that such a declaration is not sufficient unless followed by the assumption of the marital duties.²

§ 91. Common-law marriages—Rule denying validity.— In a number of the states these marriages are not recognized as binding. This arises, in some cases, by reason of statutes innovating upon the common-law rule, and in others by judicial construction denying, in general terms and upon general principles, marriages where no formality is observed. Sundry statutes and decisions touching this theory are given in a note.³

¹ Civ. Code Cal., § 55.

² *Toon v. Huberty*, 104 Cal. 260, 37 Pac. Rep. 944; *Kilburn v. Kilburn*, 89 Cal. 46, 26 Pac. Rep. 636; *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. Rep. 345; *Sharon v. Terry*, 36 Fed. Rep. 337; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. Rep. 26. Under the law in this state, where no marriage ceremony is performed, and no agreement of marriage nor cohabitation as husband and wife is entered into, but simply an introducing by a man of a woman as his wife, and so registering at a hotel, there is no sufficient assumption of the marriage relation to establish the status under this law. *People v. Lehman*, 104 Cal. 631, 38 Pac. Rep. 422; *Hinckley v. Ayers*, 105 Cal. 357, 38 Pac. Rep. 735. But where the parties agree to marry and actually assume the marital state, it is as valid as a marriage entered into in the most formal manner. And this is true even in establishing the marriage on a charge of bigamy *People v. Beevers*, 99 Cal. 286, 33 Pac. Rep. 844. And before the statutory changes in this state, marriage by present consent and cohabitation fol-

lowing was sufficient. *Graham v. Bennett*, 2 Cal. 503.

³ Civ. Code Cal., § 55; *Toon v. Huberty*, 104 Cal. 260, 37 Pac. Rep. 944; *Kilburn v. Kilburn*, 89 Cal. 46, 26 Pac. Rep. 636; *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. Rep. 345; *Sharon v. Terry*, 36 Fed. Rep. 337; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. Rep. 26; *People v. Lehman*, 104 Cal. 631, 38 Pac. Rep. 422; *Hinckley v. Ayers*, 105 Cal. 357, 38 Pac. Rep. 735; *People v. Beevers*, 99 Cal. 286, 33 Pac. Rep. 844; *Graham v. Bennett*, 2 Cal. 503; *Denison v. Denison*, 35 Md. 361; *Askew v. Dupree*, 30 Ga. 173; Code Ga., 1863, § 1653 et seq.; *Clark v. Cassidy*, 64 Ga. 663; *Smith v. Smith*, 84 Ga. 440, 11 S. E. Rep. 496; *Londonnery v. Chester*, 2 N. H. 268; *Dumbarton v. Franklin*, 19 N. H. 257; *Northfield v. Plymouth*, 20 Vt. 582; *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. Rep. 829; *State v. Samuel*, 2 Dev. & Bat. (N. C.) 177; *State v. Ta-Cha-Na-Tah*, 64 N. C. 614; *State v. Hodgskins*, 19 Me. 155; *Milford v. Worcester*, 7 Mass. 48; *Peck v. Peck*, 155 Mass. 479, 30 N. E. Rep. 74; *Commonwealth v. Munson*, 127 Mass. 459; *Thompson v.*

§ 92. **Gretna Green marriages.**— This term is applied to marriages of persons who went to Gretna, in Dumfries, Scotland, being the nearest point in Scotland and just across the English border, for the purpose of contracting marriages according to the law of Scotland. Resort was usually had to this method when some impediment existed to the marriage by the law of England. But by statute 19 and 20 Vict., § 1, such marriages are now invalid unless one or both of the parties at the time of the marriage has been *bona fide* a resident of Scotland at least twenty-one days.¹ It is a term usually applied to marriages of parties who go to a state or country different from that of their domicile to evade the laws of the domicile or escape opposition from parents, the disabilities of non-age, kinship, etc.

§ 93. **Proof of—Reputation of the parties.**— There are many ways in which the contract of marriage may be proven. A frequent mode is to show the reputation as married persons of the parties whose marriage is in issue. The general rule in all civil cases is, where a man and woman live together as husband and wife, recognizing each other as such, and being so reputed among their friends, relatives and acquaintances; where they have children who are recognized as legitimate by themselves and are generally reputed as legitimate; who have lived together and conducted themselves towards each other and the world at large as married persons, the law will infer a marriage regularly entered into. In all such cases the inference or presumption is, such conduct, holding out and reputation are inconsistent with anything short of a valid marriage; that parties are not living in adultery or illicit intercourse to their own disgrace and the violation of the law. It is matter of common knowledge that when persons so live together and build

Thompson, 114 Mass. 566; Norcross v. State, 2 Yerg. (Tenn.) 589; Stans v. Norcross, 155 Mass. 425, 29 N. E. Baitey, 9 Wash. 115, 37 Pac. Rep. 316; Rep. 506; Smith v. Smith, 1 Tex. 621; In re Smith's Est., 4 Wash. 702, 30 Pac. Rep. 1059; In re McLaughlin's Western Union Telegraph Co. v. Est., 4 Wash. 570, 80 Pac. Rep. 651; Proctor, 6 Tex. Civ. App. 300, 25 S. Kelly v. Kitsap County, 5 Wash. 521, W. Rep. 811; Beverlin v. Beverlin, 32 Pac. Rep. 554.
29 W. Va. 732, 3 S. E. Rep. 36; Bashaw v. State, 1 Yerg. (Tenn.) 177; Grisham

¹ Rapalje & Lawrence, Law Dict., "Gretna Green Marriage."

up a reputation of marriage, they have been, at some time, actually and legally married, unless it be in very rare cases. This being true, it is generally sufficient, in order to show a valid marriage for all civil purposes, to show such a state of facts.¹ But the presumption does not extend to instances where it is shown that a subsequent marriage of one of the parties has taken place with a stranger; and while the first marriage could not then be established by the usual presumptions, it might be proven by direct evidence that it was actually contracted and was regular.²

§ 94. Proof of—Divided reputation.—The reputation which will be considered in law as sufficient proof of a marriage contract must be uniform and undivided; must be permanent and not changing; must be in good faith, and not merely built up for the purpose of shielding either party from disgrace or for other improper motive. An acknowledgment of the marital relation at one time and a denial at another is not a sufficient holding out or reputation of marriage to establish the status. It must be to all persons, at all times, on all occasions, under all circumstances, to friends, relatives, and stran-

¹ Willinson v. Payne, 4 T. R. 468; Jenkins v. Bisbee, 1 Edw. Ch. 377; Purcell v. Purcell, 4 H. & Munf. (Va.) 507; Redgrave v. Redgrave, 38 Md. 97; Northfield v. Vershire, 33 Vt. 110; Harman v. Harman, 16 Ill. 85; Henderson v. Cargill, 31 Miss. 367; Birt v. Barlow, 1 Doug. 170; Cargile v. Wood, 63 Mo. 501; Mayo v. Brown, 1 Lee, Ecc. 271; Plunkett v. Sharp, 2 Lee, Ecc. 35; Hynes v. McDermott, 91 N. Y. 451; Gall v. Gall, 114 N. Y. 109, 21 N. E. Rep. 106; Hynes v. McDermott, 10 Daly, 423; State v. Tachanatah, 64 N. C. 14; Tumalty v. Tumalty, 3 Bradf. 369; Renholm v. Public Adm'r, 2 Redf. 456; Carjalle v. Ferrie, 23 N. Y. 90; Badger v. Badger, 83 N. Y. 56; Green v. State, 59 Ala. 68; Thorndell v. Morrison, 25 Pa. St. 326; O'Gara v. Eisen, 38 N. Y. 296; Meister v. Moore, 96 U. S. 76; Port v. Port, 70 Ill. 484; Bricking's Appeal, 2 Brewst. (Pa.) 202; Arnold v. Chesebrough, 46 Fed. Rep. 700; Hervey v. Hervey, 2 Wm. Bl. 877; Degnan v. Degnan, 17 N. Y. S. 883; Campbell v. Campbell, L. R. 1 H. L. Sc. 200; State v. Gonce, 79 Mo. 600; Hays v. People, 25 N. Y. 390; White v. White, 82 Cal. 727, 23 Pac. Rep. 276; Hicks v. Cochran, 4 Edw. Ch. 107; Donnelly v. Donnelly, 8 B. Mon. (Ky.) 113; Rose v. Clark, 8 Paige, 574; Yates v. Houston, 3 Tex. 433; James v. Mickey, 26 S. C. 270, 2 S. E. Rep. 130; 2 Greenl. Ev. 462; Smith v. Smith, 52 N. J. L. 207, 19 Atl. Rep. 255; In re Wallace's Estate, 49 N. J. Eq. 580, 25 Atl. Rep. 260; Thompson v. Nims, 83 Wis. 261, 53 N. W. Rep. 502; Jackson v. Jackson, 80 Md. 176, 30 Atl. Rep. 572; Brinkley v. Brinkley, 50 N. Y. 184; Sellman v. Bowen, 8 Gill & J. (Md.) 50.

² Jenkins v. Jenkins, 83 Ga. 283, 9 S. E. Rep. 541.

gers alike, and in the fullest sense, uniform, undivided and continuing.¹ Cohabitation, as understood in law, is not a sojourn of the parties together, nor a regular visiting and remaining with each other for a time. But they must have the same habitation, so when one is at his or her place of abode the other is likewise.²

§ 95. Proof of—Degree of proof required in criminal and quasi-criminal cases.—While the rule is well fixed that a marriage may generally be shown by proof of reputation of the parties, yet cohabitation, reputation, recognition, etc., fall short of the proof required in criminal cases, where the fact of marriage must be shown beyond a reasonable doubt. In cases like slander, seduction, and like cases of a criminal nature, the proof must be positive, not conjectural or presumptive merely. The presumption of innocence will usually override that of marriage in all cases of this nature, because the marriage must be shown to such certainty that all reasonable doubt is excluded.³ But when one is charged with a crime and his guilt hinges on the fact of a marriage, it is perfectly proper to prove

¹ *Odd Fellows' Benefit Ass'n v. Carpenter* (R. I.), 24 Atl. Rep. 578; *Arnold v. Chesebrough*, 58 Fed. Rep. 833, 7 C. C. A. 508, 11 U. S. App. 792, affirming same case reported in 46 Fed. Rep. 700; *Poole v. Poole*, 1 Younge, 331; *Van Dusan v. Van Dusan*, 97 Mich. 70, 56 N. W. Rep. 234; *McConnell v. New Orleans*, 15 La. Ann. 410; *Blasini v. Blasini*, 30 La. Ann. 1398; *Powers v. Charlemury*, 35 La. Ann. 630; *Cunningham v. Cunningham*, 2 Dow, 482; *Badger v. Badger*, 88 N. Y. 547; *Wharton, Ev.*, § 225; *Northrop v. Knowles* (Conn.), 2 Atl. Rep. 395; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. Rep. 737; *In re Wallace's Estate*, 49 N. J. Eq. 530, 25 Atl. Rep. 260; *Yardley's Case*, 75 Pa. St. 207; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. Rep. 752; *Barnum v. Barnum*, 42 Md. 251; *Wilson v. Hill*, 13 N. J. Eq. 143; *Bricking's Appeal*, 2 Brewst. (Pa.) 202; *White v. White*, 82 Cal. 427, 23 Pac. Rep. 276; *Hamilton v. Ham-*

ilton, 1 Bell App. Cas. 736; *State v. Armstrong*, 4 Minn. 335.

² *In re Yardley's Estate*, 75 Pa. St. 207; *Estate of Grim*, 131 Pa. St. 199, 18 Atl. Rep. 1061.

³ *Catherwood v. Caslon*, 13 M. & W. 261; *Leader v. Barry*, 1 Esp. 353; *Johnson v. Johnson*, 114 Ill. 611, 3 N. E. Rep. 232; *Coal Run Coal Co. v. Jones* (Ill.), 38 N. E. Rep. 865; *Dixon v. People*, 18 Mich. 84; *Taylor v. Shemwell*, 4 B. Mon. (Ky.) 575; *People v. Anderson*, 26 Cal. 129; *Henderson v. Cargile*, 31 Miss. 367; *Northfield v. Vershire*, 33 Vt. 110; *Morris v. Morris*, 4 Burr. 2057; *Birt v. Barlow*, 1 Doug. 171; *People v. Humphrey*, 7 Johns. 314; *Hutchins v. Kimmell*, 31 Mich. 126; *Clayton v. Wardell*, 4 N. Y. 230; *State v. Roswell*, 6 Conn. 446; *Case v. Case*, 17 Cal. 598; *Hammick v. Bronson*, 5 Day (Conn.), 290; *Ford v. Ford*, 4 Ala. 142; *Taylor v. Robinson*, 29 Me. 323; 2 Greenl. Ev., § 462; *Redgrave v. Redgrave*, 38 Md. 93; *Boone*

the marriage by his own admissions. And this may be shown by his written statements or oral declarations.¹

§ 96. **Cohabitation as proof of.**—Cohabitation between a man and woman as man and wife is usually regarded in law as evidence of marriage, and entitled to more or less weight according to the circumstances. The cohabitation mentioned in the books as necessary to follow a contract of marriage *per verba de futuro* must be an actual dwelling together by the parties as husband and wife, and a mutual recognition of each other as such in pursuance of the marriage contract. A mere illicit intercourse, though extending over a long period, can never have the effect of validating or consummating a marriage dependent upon cohabitation to complete it.² Indeed,

v. Purnell, 28 Md. 607; *Stover v. Boswell*, 3 Dana (Ky.), 233; *Senser v. Bower*, 1 Pen. & W. (Pa.) 450; *Barnum v. Barnum*, 42 Md. 251. Proof of marriage alone is not sufficient. *Fenton v. Reed*, 4 Johns. 52; *State v. Hodgskins*, 19 Me. 155. In a prosecution for adultery it is not necessary to show an actual marriage, but that both the parties had capacity to marry. And if one be under the age of consent at the time of the marriage, it will be necessary to show that she ratified it after arriving at the recognized age. *People v. Bennett*, 39 Me. 208. In Massachusetts it is provided by statute that marriages may be proven in criminal and quasi-criminal cases by the same kind of evidence as in other actions. And in Vermont it has recently been held, in the absence of statute, that such proof of marriage is proper in criminal cases. *State v. Brink* (Vt.), 35 Atl. Rep. 492. See also *Forney v. Hallacher*, 8 S. & R. (Pa.) 158.

¹ *People v. Imes* (Mich.), 68 N. W. Rep. 157; *State v. McDonald*, 25 Mo. 176; *Forney v. Hallacher*, 8 S. & R. (Pa.) 158; *State v. Hilton*, 3 Rich. Eq. (S. C.) 434; *Cook v. State*, 11 Ga. 53; *O'Neale v. Commonwealth*, 17 Gratt.

(Va.) 582; *State v. Abbey*, 29 Vt. 60. But it seems that an extra-judicial confession, without any other evidence of the marriage, is not sufficient to convict of a crime. *People v. Isham* (Mich.), 67 N. W. Rep. 819. See also *People v. Humphrey*, 7 Johns. 314; *State v. Roswell*, 6 Conn. 446. This is on the theory that a confession of this kind, when not corroborated, is not sufficient to establish the *corpus delicti*. *People v. Lane*, 49 Mich. 340, 13 N. W. Rep. 622; 1 Greenl. Ev., § 217; *People v. Hess*, 85 Mich. 128, 48 N. W. Rep. 181.

² *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. Rep. 26; *In re Wallace's Estate*, 49 N. J. Eq. 530, 25 Atl. Rep. 260; *Appeal of Reading Fire Ins. Co.*, 113 Pa. St. 204, 6 Atl. Rep. 60; *Dumbarton v. Franklin*, 19 N. H. 257; *Johnson v. Johnson*, 30 Mo. 173; *Vreeland v. Vreeland*, 18 N. J. Eq. 43; *In re Yardley's Estate*, 75 Pa. St. 207; *In re Grim's Estate*, 131 Pa. St. 199, 18 Atl. Rep. 1061; *Goldbeck v. Goldbeck*, 18 N. J. Eq. 42; *Johnson v. Johnson*, 30 Mo. 72; *Port v. Port*, 70 Ill. 484; *Brinkley v. Brinkley*, 50 N. Y. 184; *Stans v. Baitey*, 9 Wash. 115, 37 Pac. Rep. 316. And see *Cannon v. United States*, 116 U. S. 55, 6 Sup. Ct. Rep. 278.

cohabitation and repute can never amount to marriage. It is "a mode of proving the fact of marriage, rather than a mode of contracting marriage."¹

§ 97. Presumptions of, from cohabitation — Rebuttal.— While cohabitation is always evidence tending to prove a marriage contract by inference or presumption, yet it need not be accepted as conclusive proof. On the contrary, it is always permissible to show that cohabitation, though apparently matrimonial, is really otherwise, and that the parties are living in a state of illicit intercourse. So it may be shown, in rebuttal that the cohabitation is lawful, by any fact or circumstance tending to establish a condition of things inconsistent with a *bona fide* matrimonial purpose, as, for instance, that the parties live at a brothel.² Or that the parties, who once lived together, ceased to do so, and respectively married strangers.³ Generally, where there is a controversy as to the nature of the cohabitation relied upon to establish a marriage, the issue will resolve itself into one of fact. This being true, the reputation of the parties for chastity, honor and good standing is legitimate evidence, as it is well known that those who are inclined to licentiousness are more apt to indulge in illicit commerce than those whose personal chastity and purity is at par.⁴ And, ordinarily, the declarations and admissions of the parties themselves is admissible to show the character of the cohabitation and the manner in which it is regarded by them.⁵

¹ Campbell v. Campbell, L. R. 1 H. L. Sc. 200, 201. And the law very readily accepts evidence of cohabitation and recognition to aid in establishing a marriage when the parties have lived together as married persons for a long time. And especially is this true after the parties are dead, and little good could be accomplished by declaring the marriage void. Copes v. Pearce, 7 Gill (Md.), 247. Where it is shown, however, that parties, notwithstanding they have cohabited together as husband and wife, have never really entered into a marriage contract, and do not regard themselves as man and wife,

there is no presumption of a marriage. Hunt's Appeal, 86 Pa. St. 294. And see Voorhees v. Voorhees, 46 N. J. Eq. 411, 19 Atl. Rep. 172.

² Jackson v. Jackson, 80 Md. 176, 80 Atl. Rep. 752.

³ Weatherford v. Weatherford, 20 Ala. 548; Jackson v. Van Buskirk, 18 Johns. 345.

⁴ Jackson v. Jackson, 80 Md. 176, 80 Atl. Rep. 752; Vincent's Appeal, 60 Pa. St. 240.

⁵ Philbrick v. Spangler, 15 La. Ann. 46; Johnson v. Johnson, 30 Mo. 73. But where a man and woman take up with each other and live in a state of immorality, it will not be inferred

§ 98. Cohabitation — Presumptions attending.— The presumption of law is that the cohabitation of a man and woman is lawful until the contrary is made to appear. Persons do not thus live and recognize each other as man and wife except in pursuance of a *bona fide* contract of marriage, as a rule at least. The law is not quick to impute evil or criminal acts to any, and freely indulges the salient presumption that all claiming to be living in lawful wedlock are actually so living. In fact, any other presumption would establish, *prima facie*, immoral relations and unlawful acts in all who are living together as married persons.¹ But this wholesome presumption of validity does not apply where the parties conceal their marriage, live apart from each other, and no motive or intelligent purpose is shown for so living. In such instances the presumption is rather that the relation is unlawful, for the law does not favor concealment.²

§ 99. Illicit intercourse — Presumptions as to continuance.— While the law is ready to indulge all reasonable presumptions in favor of marriage and legitimate cohabitation, this rule is never extended to cases where the relations of the parties are, in their origin, illicit and unlawful. When persons deliberately take up an illicit relation with each other and start a life of immorality and shame, there is no reason to

that, after the disability of a former marriage of one of the parties with a stranger is removed by death, a marriage was thereafter contracted, as this would be in violation of the presumption that an illicit relation is presumed to continue until the contrary is affirmatively shown. *Ross v. Ross*, 67 Mich. 619, 35 N. W. Rep. 802; *In re Grim's Estate*, 131 Pa. St. 199, 18 Atl. Rep. 1061. So, a person charged with bigamy may show by evidence of repute and cohabitation that the woman with whom he first lived was reputed to be married and lived with another man at the time of the first marriage, and that, as she was living with, and reputed to be the wife of, another at the time of the second marriage, the marriage in

question could not be valid. *State v. Sherwood* (Vt.), 35 Atl. Rep. 352.

¹ *Gibson v. Gibson*, 24 Neb. 394, 39 N. W. Rep. 450; 2 Greenl. Ev., § 462; *Ford v. Ford*, 4 Ala. 144; *Taylor v. Robinson*, 29 Me. 323; *Commonwealth v. Hurley*, 14 Gray (Mass.), 411; *Redgrave v. Redgrave*, 38 Md. 93; *Boone v. Purnell*, 28 Md. 607; *Stover v. Boswell*, 3 Dana (Ky.), 233; *Senser v. Bower*, 1 Pen. & W. (Pa.) 450; *Piers v. Piers*, 2 H. L. 331; *Stode v. Mayswan*, 2 Bush (Ky.), 621; *Star v. Peck*, 1 Hill, 270; *Dannelli v. Dannelli*, 4 Bush (Ky.), 51; *Lutenbacher v. Lascher*, 37 La. Ann. 831; *Succession of Navarro*, 24 La. Ann. 298; *Canody v. George*, 6 Rich. (S. C. Eq.) 103.

² *Cunningham v. Burdell*, 4 Bradf. 343.

presume, in the absence of an affirmative showing to the contrary, that they have changed their mode of cohabitation, or have since married each other.¹ The presumption of a continuance of such illicit relations is not affected because a disability of marriage, existing in one of the parties at the beginning of the relations, is subsequently removed, where no visible change in the manner of living is made to appear.² The fact that the parties living in such unlawful state demean themselves as married persons does not help the case any. Indeed, if anything, it aggravates the ignominy of their conduct.³ Where it is sought to show that an illicit relation has become a lawful one, the *onus* is on the party attempting to do so, which may be either by direct or circumstantial proof.⁴ It is perfectly proper to permit any one to show by competent testimony that a relation, illicit in its inception, has become legitimate by the solemnization of a regular marriage between the parties. Such

¹State v. Sherwood (Vt.), 35 Atl. Rep. 352; Barnes v. Barnes, 90 Iowa, 282, 57 N. W. Rep. 851; Jones v. Jones, 45 Md. 144; Canjolle v. Ferrie, 23 N. Y. 90; Bicking's Appeal, 2 Brewst. (Pa.) 202; Jackson v. Jackson, 80 Md. 176, 30 Atl. Rep. 752; Clayton v. Wardell, 4 N. Y. 230; Barnum v. Barnum, 42 Md. 251; Cunningham v. Cunningham, 2 Dow, 482; Jones v. Jones, 4 Pa. Dist. Rep. 223; Terry v. White, 58 Minn. 268, 59 N. W. Rep. 1013; Cartwright v. McGown, 121 Ill. 388, 12 N. E. Rep. 737; Gall v. Gall, 114 N. Y. 109, 21 N. E. Rep. 106; Spencer v. Pollock, 83 Wis. 215, 53 N. W. Rep. 490; Appeal of Reading Fire Ins. & Trust Co., 113 Pa. St. 204, 6 Atl. Rep. 60; Williams v. Williams, 46 Wis. 464, 1 N. W. Rep. 98; Estate of Briswalter, 72 Cal. 107, 13 Pac. Rep. 164; Sharon v. Sharon, 75 Cal. 1, 16 Pac. Rep. 345; Ahlberg v. Ahlberg, 24 N. Y. S. 919; Fagan v. Fagan, 11 N. Y. S. 748; Bates v. Bates, 27 N. Y. S. 872, 7 Misc. Rep. 547; In re Gall's Will, 9 N. Y. S. 466; Wilcox v. Wilcox, 46 Hun, 32; Floyd v. Calvert, 53 Miss. 37; Hunt's Appeal, 86 Pa. St. 294.

²Collins v. Voorhees, 47 N. J. Eq.

555, 22 Atl. Rep. 1034; Appeal of Reading Fire Ins. & Trust Co., 113 Pa. St. 204, 6 Atl. Rep. 90; Barnes v. Barnes, 90 Iowa, 282, 57 N. W. Rep. 851; Cargile v. Wood, 68 Mo. 501; Foster v. Hawley, 8 Hun, 68; State v. Sherwood (Vt.), 35 Atl. Rep. 352; Jones v. Jones, 45 Md. 144; Taylor v. Taylor, 2 Lee, 274.

³Crymble v. Crymble, 50 Ill. 544; Cunningham v. Cunningham, 2 Dow, 482. "A man may live with his kept mistress," says Judge Sharswood, "in such a way as to create a kind of repute of marriage among some persons. He may even, to gratify her, allow himself to be held out to her friends and acquaintances as her husband, may recognize the fruit of the connection, and manifest affection and tenderness towards them, and yet the evidence fall far short of that which ought to satisfy the mind that there was an actual agreement to form the relation of husband and wife." Bicking's Appeal, 2 Brewst. (Pa.) 202.

⁴Williams v. Williams, 46 Wis. 464, 1 N. W. Rep. 98.

relation does not preclude the parties from afterwards mending their ways and living in lawful matrimony.¹

§ 100. Reputation of the parties as married persons — Presumptions.—Where persons are shown to be married it is not necessary to prove in what manner they were married. The law presumes validity whenever it is shown that the marriage has taken place, in the absence, of course, of a different state of facts affirmatively proven.² The same presumption is indulged where the parties have lived together as husband and wife for a long time, believing themselves to have been regularly married, and where they have earned such a reputation among their neighbors, relatives and acquaintances.³ And in such instances it requires strong, clear, convincing and satisfactory proof to overcome this fixed presumption of validity.⁴ The law is so ready and willing to indulge the presumption of a marriage that all things necessary to a legal marriage will be presumed where the parties hold themselves out to the world as being married, and there is nothing to indicate the contrary.⁵ Where the marriage is once shown to have been consummated, proof of the reputation that the parties are not married is not competent. The contract being a fact, it is of little consequence what others think about it.⁶

§ 101. Proof of — Presumptions — When overcome.—The presumption that a man and woman living together as married persons are legally married is overcome when the fact of a prior actual marriage of one of the parties is affirmatively

¹ Williams v. Williams, 46 Wis. 464, 1 N. W. Rep. 98; Dannelli v. Dannelli, 4 Bush (Ky.), 51; Badger v. Badger, 88 N. Y. 546.

² Hull v. Rawls, 27 Miss. 471; Powell v. Powell, 27 Miss. 783; Ward v. Dulaney, 23 Miss. 410.

³ Piers v. Piers, 2 H. L. Cas. 331.

⁴ Newburyport v. Boothebay, 9 Mass. 414; Stephenson v. Gray, 17 B. Mon. (Ky.) 193; People v. Anderson, 26 Cal. 129; Piers v. Piers, 2 H. L. Cas. 331.

⁵ Northey v. Cock, 2 Add. Ecc. 294; Peet v. Peet, 52 Mich. 464, 18 N. W.

Rep. 221; Jones v. Jones, 28 Ark. 19; 2 Greenl. Ev., § 462; Taylor v. Robinson, 29 Me. 323; Hoffman v. Simpson (Mich.), 67 N. W. Rep. 1107; Steadman v. Powell, 1 Add. Ecc. 58. And where common-law marriages are recognized, the rule is not changed because the marriage is of a clandestine nature. Steadman v. Powell, 1 Add. Ecc. 58. The presumption is especially strong after the death of one of the parties to the marriage. Northey v. Cock, 2 Add. Ecc. 294.

⁶ Northrup v. Knowles (Conn.), 2 Atl. Rep. 305.

shown to have taken place before the reputed marriage. This is grounded on the theory that the presumption of innocence of the crime of bigamy or other offense against the criminal law is paramount to that of the validity of the marriage.¹ The presumption is in no case conclusive, even in the absence of any apparent irregularity. And any facts may be shown which would destroy the presumption, and when this is done the presumption gives way.² But as a general rule, it would require more than a bare preponderance of evidence to overcome the presumption of marriage, for this, under certain circumstances, is sufficient to establish the marriage; and, as it necessarily takes some affirmative proof to overturn a presumption, a bare preponderance which is not stronger than the presumption would not suffice.

§ 102. Proof of — Presumption of life.— According to the common law, a party who has been absent beyond the seas for the space of seven years, without being heard from, is presumed to be dead. But until he has been absent this length of time, the presumption of life obtains. And where one is married to a person so beyond the seas, the validity of the marriage will last until the full time for the presumption of death because of absence for the established period.³ This presumption arises when the whereabouts of the absent party is not known. If he have a known place of residence or domicile in a foreign country, the presumption of life holds, and the failure to hear from him in such country alone is not sufficient upon which to base the presumption of death.⁴ And

¹ *Jones v. Jones*, 48 Md. 391, 398; *Hebblethwaite v. Hepworth*, 98 Ill. 126.

² *In re Strauss' Estate*, 34 W. N. C. 478; *Allen v. Hall*, 2 Nott & McC. (S. C.) 114; *Jones v. Jones*, 48 Md. 391; *Myatt v. Myatt*, 44 Ill. 473. There is no presumption that a woman of whom nothing is previously known, who comes into a community calling herself Mrs. A., is married, when there is no one else in the locality by the same name. *Blair v. Howell*, 68 Iowa,

619, 28 N. W. Rep. 199. Likewise, the testimony of a single person that he knew a woman as a married person for a few months before, but who had recently moved into the community from a distance, is not of itself sufficient to raise the legal presumption of a marriage. *Jones v. Hunter*, 2 La. Ann. 254.

³ *Montgomery v. Beavans*, 1 Sawy. 653; *Whiting v. Nicholl*, 46 Ill. 230.

⁴ *Francis v. Francis* (Pa.), 37 Atl. Rep. 120. Of course, if he should be

generally it is not necessary that the party be absent beyond the seas; but the rule will apply equally as well where the absence has been from the place of abode for the prescribed period.¹ As a rule, the death of neither party to a marriage will be presumed short of this period.² The presumption of law is always with life; and where it is attempted to show death by presumption, the necessary facts upon which to found it must be made to appear affirmatively.³

§ 103. Proof of—Presumption of death.—The presumption of death must arise from proof of the absence of the party for the requisite period of time. The fact that he may be reputed dead is not sufficient.⁴ As the law favors the presumption of marriage, the death of a party will sometimes be inferred from extraordinary facts after a very short time, in order to uphold the relation. Thus, where a husband left home for a distant state on business, was last heard from about a month later, when he wrote to his wife that he was sick and would return as soon as able to travel, it was held that his death would be presumed where his wife did not hear from him within a year, when she married another.⁵ And where a person took passage from New York for England March 11, 1841, and the ship in which he embarked was never heard from, it was held that his death would be conclusively presumed after six weeks, the time required to make the voyage then being about fifteen days.⁶ Where the person has been absent the requisite period, the presumption of law is that he died on the last day of the prescribed time, and not before.⁷ The presumption relates to the beginning of the time.⁸ And generally, where a person is

absent for the seven years, and no tidings could be had of him after *bona fide* effort to communicate with him, the presumption of death would arise as soon as this state of things had existed for the requisite period of time.

¹ Whiting v. Nicholl, 46 Ill. 230.

² O'Gara v. Eisenlohr, 38 N. Y. 296.

³ Lockhart v. White, 18 Tex. 102; Yates v. Houston, 3 Tex. 433; Rex v. Twynning, 2 B. & Ald. 386. See Carroll v. Carroll, 20 Tex. 71.

⁴ In re Hurlburt's Estate (Vt.), 35 Atl. Rep. 77.

⁵ Wilkie v. Collins, 48 Miss. 496; Greensborough v. Underhill, 12 Vt. 604; Rex v. Twynning, 2 B. & Ald. 386; Webster v. Birchmore, 13 Ves. 362.

⁶ Oppenheim v. Wolfe, 3 Sandf. Ch. 571. See also, to like effect, Sillick v. Boothe, 20 Eng. Ch. 116.

⁷ Moffit v. Varden, 5 Cranch (C. C.), 658.

⁸ Webster v. Birchmore, 13 Ves. 362.

shown to have been alive at any time during the period, it is incumbent on the party alleging the death to establish it.¹

§ 104. Proof of—How reputation may be established.—The reputation that certain parties are married may be made to appear in many ways. Any facts which tend to show that it exists may be proven, just as on any other issue. It is not at all necessary that the evidence tending to show the facts come from the parties or either of them, but it may be made to appear from the testimony of any one who knows of the reputation.² But the witness must testify from his own knowledge of the reputation, not from what he has heard others say about it.³ In establishing a marriage by reputation it is competent to prove conversations of the parties; their letters; the fact that they always address each other and demean themselves as man and wife; or their elopement as lovers and subsequent return and living together as married persons; their appearing in respectable society as married people, and being so generally received; their observance of the customs and usages of society peculiar to the entry upon or continuance of the marital state; the assumption by the woman of the name of the man; the wedding ring, and, in short, any conduct or facts whatever legitimately leading to the inference of marriage.⁴ The length of time necessary for the reputation to be in existence before a marriage may be based upon it is not easy to lay down. Lord Blackburn thought three or four weeks not sufficient, but felt that there was no inflexible rule by which it might be determined. His Lordship also thought that habit and repute were not established by the parties speaking casually of each other as man and wife to persons to whom the

¹ *Gilleland v. Martin*, 3 McLean, 490; *Montgomery v. Bayans*, 1 Sawyer, 652; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Lapsey v. Grierson*, 1 H. L. 498.

² *Knower v. Wesson*, 13 Metc. (Mass.) 143. It may be proven by an heir seeking to recover property, where his right to do so depends upon the establishment and validity of the marriage. *Fleming v. Fleming*, 4 Bing. 266.

³ *Boone v. Purnell*, 28 Md. 607.

⁴ *Clayton v. Wardell*, 4 N. Y. 280; *Gratgen v. Gratgen*, 3 Bradf. 373; 2 Greenl. Ev., § 462; *Applegate v. Applegate*, 45 N. J. Eq. 116, 17 Atl. Rep. 293; *Clark v. Clark*, 52 N. J. Eq. 650, 30 Atl. Rep. 81. But it cannot be shown, after a woman has left her husband, that she was unchaste before that time in order to disprove an asserted marriage. *Jackson v. Jackson* (Md.), 33 Atl. Rep. 317.

introduction of the woman could be neither significant nor important.¹ But upon an issue of marriage, the fact that the attempted proof by reputation fails does not, in any sense, preclude the admissibility or competency of proof of the fact by any other competent evidence that would establish it.² And the reputation of the parties as married persons cannot be disproved by the evidence of a witness that this reputation is divided. This is but stating a conclusion, not the facts from which the same may be drawn.³

§ 105. **Proof of—Onus.**—Where the existence of a marriage is alleged, it is always necessary for the person relying on the same to establish it by competent evidence. The party denying the marriage has no proof to make until the *prima facie* case is made out by his adversary. But in making the *prima facie* case it is not necessary to prove where nor when the contract was made; it is sufficient that it be shown that, at some time, it was actually entered into.⁴ And where the proof leaves the fact of marriage in doubt, the courts will always resolve the doubt in favor of the marriage. Especially is this true when the marriage has for many years been supposed to lawfully exist, or where an adjudication of nullity would bastardize children or have a like evil effect.⁵

§ 106. **Presumptions as to validity.**—Where parties, being competent to enter into the relation, do so before a person assuming to act in the capacity of a clergyman or other officer authorized by law to officiate at marriage ceremonies, and believe and act upon the fact that they are thereby made husband and wife, and are thereafter so reputed, the law readily presumes the validity of the contract. If it is assailed the *onus* is

¹ Dysart Peerage Case, 6 App. Cas. 489, 518.

² Pearce v. Jacobs, 7 Mackey, 498; Applegate v. Applegate, 45 N. J. Eq. 116, 17 Atl. Rep. 298; In re Hamilton, 76 Hun, 200, 27 N. Y. S. 813; In re Wallace's Estate, 49 N. J. Eq. 530, 25 Atl. Rep. 260; Thompson v. Nims, 83 Wis. 261, 53 N. W. Rep. 502; Jackson v. Jackson, 80 Md. 176, 30 Atl. Rep. 752; Clark v. Clark, 52 N. J. Eq. 650, 30 Atl. Rep. 81.

³ Jackson v. Jackson (Md.), 33 Atl. Rep. 317; Boone v. Purnell, 28 Md. 607.

⁴ Arnold v. Chesebrough, 46 Fed. Rep. 700; Williams v. Williams, 46 Wis. 464, 1 N. W. Rep. 98; Patterson v. Gaines, 6 How. (U. S.) 550.

⁵ Peet v. Peet, 52 Mich. 464, 18 N. W. Rep. 220; Starr v. Peck, 1 Hill, 270; In re Strauss' Estate, 168 Pa. St. 561, 32 Atl. Rep. 98.

on the party seeking to overthrow it to prove clearly that it has not been entered into. And so favorably does the law entertain the presumption of regularity in all such instances, that nothing short of strong, clear and convincing proof will be sufficient to uproot the presumption of regularity of the marriage as well as legitimacy of the issue.¹ This presumption is not overcome by proof that the father, after living with his reputed wife for many years and having children by her, and who, after uniformly recognizing them and his wife, repudiated the marriage after the death of the wife and disinherited the children of the union.² This presumption of validity is indulged persistently where the marriage is not assailed until after the death of one or both parties, and after they have raised a family of children who would be declared illegitimate by a decree of nullity of the marriage.³ This presumption is akin to that which obtains where a party has been notoriously and peaceably in possession of real estate under claim and acts of ownership for many years. In such cases, for the repose of titles, the security of property and the peace and order of society, a grant, or any other necessary requisite, will be presumed from the beginning; and the presumption supplies the necessity of showing the fact presumed.⁴

§ 107. What presumptions are indulged where marriage is shown to have been contracted in some form.—The rule is, where a marriage is once shown to have been celebrated or

¹ *Meggison v. Meggison*, 21 Oreg. 387, 28 Pac. Rep. 388; *Gerlach v. Turner*, 89 Cal. 446, 26 Pac. Rep. 870; *Coal Run Coal Co. v. Jones* (Ill.), 8 N. E. Rep. 865; *Applegate v. Applegate*, 45 N. J. Eq. 116, 17 Atl. Rep. 293; *Bothick v. Bothick*, 45 La. Ann. 1382, 14 S. Rep. 293. It will be clear at a glance that this presumption applies to marriages contracted in compliance with statutes requiring certain forms and solemnities. In jurisdictions where the common-law rule of marriages is recognized, it would not be necessary to show that any one officiated at the ceremony, but the same presumption would be indulged from a showing of the holding out of the parties and

recognition by them of each other as married persons.

² *Bothick v. Bothick*, 45 La. Ann. 1382, 14 S. Rep. 293.

³ *Smith v. Smith*, 52 N. J. Eq. 207, 19 Atl. Rep. 255; *Ewell v. State*, 6 Yerg. (Tenn.) 364; *Strode v. Magowan*, 2 Bush (Ky.), 621; *Nadrews v. Page*, 3 Heisk. (Tenn.) 653; *Northey v. Cock*, 2 Add. Ecc. 375.

⁴ *Snyder v. Snover*, 56 N. J. L. 20, 27 Atl. Rep. 1013; *Fletcher v. Fuller*, 120 U. S. 120, 7 Sup. Ct. Rep. 667; *French v. Edwards*, 21 Wall. 147; *Skipwith v. Martin*, 50 Ark. 141, 6 S. W. Rep. 514; *Waring v. City of Little Rock*, 62 Ark. 408, 36 S. W. Rep. 24.

contracted in any form, not only will the ceremony be presumed regular, but all necessary requirements will be presumed to have been complied with. This presumption includes the consent of the parents, lawful age, mental, physical and other requisite capacity, as well as absence of any and all disabilities, and the existence of all facts necessary to a valid marriage in every sense, to the end that the marriage may be sustained.¹ Everything necessary to a fully valid marriage, in other words, will be presumed.

§ 108. Proof of — Conflicting presumptions.— While it is true that a marriage once shown to exist will be presumed to continue until the death of one of the parties, yet this rule is not without its exceptions. So, where two persons are married to each other and one or the other afterwards marries, the law will sometimes presume that the first husband or wife is dead in order to sustain such second marriage. The presumption of innocence of the crime of bigamy or other criminal offense is paramount to that of the continuance of life. This, regardless of the fact that the first husband or wife has not been absent for the period of time laid down by law when death will be presumed.² There is no unbending rule as to this presumption in such cases. Many things have a material bearing on the probability of life or death, as age, condition of health, climate, physical condition, occupation, etc., and generally it may be said that the question of death of the first husband or wife is more properly one of fact under the circumstances of the particular case.³ But the presumption of lawful purpose in contracting marriage attends the parties where one of them, supposing a former husband or wife dead,

¹ *United States v. De Amador* (N. M.), 27 Pac. Rep. 488; *Wilkie v. Collins*, 48 Miss. 496; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. Rep. 752; *Fleming v. People*, 27 N. Y. 329; *Strode v. McGowan*, 2 Bush (Ky.), 621; *People v. Calder*, 30 Mich. 86; *Coal Run Coal Co. v. Jones* (Ill.), 8 N. E. Rep. 865; *Cartwright v. McGowan*, 121 Ill. 388, 12 N. E. Rep. 737; *Lawson*, *Presumptive Ev.* 104; *Meggison v. Megginson*, 21 Oreg. 387, 28 Pac. Rep. 388;

Jones v. Gilbert, 135 Ill. 27, 25 S. E. Rep. 566.

² *Hull v. Rawls*, 27 Miss. 471; *Chapman v. Cooper*, 5 Rich. (S. C.) 452; *Senser v. Bower*, 1 Pen. & W. 450; *Yates v. Houston*, 3 Tex. 449; *Carroll v. Carroll*, 20 Tex. 731; *Morgan v. Morgan*, 31 Miss. 547; *Lapsley v. Grier*, 1 H. L. Cas. 498.

³ *Johnson v. Johnson*, 114 Ill. 611, 3 N. E. Rep. 233.

learns for the first time, after contracting a second, that this is not true, even though the relations assumed by the second marriage are thereafter kept up.¹

§ 109. Proof of, in general.—The official entries of a marriage record, required by law to be kept, when identified by the proper custodian and introduced according to the rules of evidence, are proof that the parties mentioned therein as having been married are in fact so joined.² Proof of a foreign marriage may be made by the testimony of an eye-witness that it took place in a certain state, and was there celebrated by an officer in the habit of officiating at marriage ceremonies.³ But it by no means follows that proof by an eye-witness, or even the duly-authenticated certificate of the celebrating officer, is indispensable. Any legitimate and competent evidence of the fact will serve the same purpose.⁴ But the marriage records of a parish or other legalized record of the marriage is always competent evidence that the marriage mentioned therein has been celebrated as stated.⁵ Where it is impossible to produce the marriage certificate, its contents may be shown by parol testimony, just as in cases of any other lost instrument or writing.⁶ When it becomes necessary to prove a marriage celebrated in another state or country, it is not sufficient to show what would be a valid marriage in the jurisdiction of the forum; but it must be proven that the marriage is such as

¹ *United States v. Hays*, 20 Fed. Rep. 710.

² *Succession of Justus*, 48 La. Ann. 1096, 20 S. Rep. 690; *Anderson v. First Nat. Bank (N. D.)*, 67 N. W. Rep. 619. The laws requiring the registry of marriages usually do not affect the validity of the contract itself. They are generally construed to be intended only to furnish a convenient mode of proof of the relation. *Read v. Paffer*, 1 Esp. 213, 214.

³ *State v. Kean*, 10 N. H. 347; *Mills v. United States*, 1 Pin. (Wis.) 73.

⁴ *Martin v. Martin*, 22 Ala. 86; *Ferrie v. Public Adm'r*, 3 Bradf. 151.

⁵ *Hawes v. State*, 88 Ala. 37, 7 S. Rep. 302; *State v. Abbey*, 29 Vt. 60; *Northrop v. Knowles (Conn.)*, 2 Atl.

Rep. 395; *Erwin v. English*, 61 Conn. 502, 23 Atl. Rep. 753; *Cood v. Cood*, 1 Curt. Ecc. 755; *Hutchins v. Kimmel*, 31 Mich. 126; *Camden v. Belgrade*, 78 Me. 204, 3 Atl. Rep. 652; 2 Greenl. Ev., § 461; *Lord v. State*, 17 Neb. 526, 23 N. W. Rep. 507.

⁶ *Camden v. Belgrade*, 78 Me. 204, 3 Atl. Rep. 652; 2 Greenl. Ev., § 461; *Lord v. State*, 17 Neb. 526, 23 N. W. Rep. 527. A sworn copy of an ecclesiastical record of a marriage properly produced by the keeper thereof is competent evidence of the facts therein stated, where the bishop, who is shown to be the legal custodian of the records, produces the original. See *Northrop v. Knowles (Conn.)*, 2 Atl. Rep. 395.

would be recognized by the laws of the country where celebrated.¹ Indeed, a contrary rule would ignore the generally-recognized principle that a marriage or other contract, valid according to the laws of the country where, in good faith, it is made, is valid everywhere. On the other hand, it has been held that it is competent to show by parol that a marriage celebrated in a foreign land was not contracted as required by such laws, and is therefore void in all other jurisdictions.² A marriage may always be proven by the declarations and admissions of one or both of the parties when there can be no danger of the declarations or admissions having been made designedly or through interest.³ Where a bill for dress-making for the alleged wife was presented to the husband, and he agreed to pay it without objection, this was held a sufficient tacit admission of the marriage contract to make the husband liable for the amount.⁴ So, a photograph sent by the husband to the wife, with the inscription in his handwriting, "to remembrance from your dear husband," is competent evidence of the admission of the marriage.⁵ In a suit to annul a marriage, courts are extremely reluctant to accept the admissions of either party that there was a previously existing contract of marriage by either with another.⁶ It is perfectly competent to prove a marriage by the oral testimony of one who witnessed

¹ *State v. Behram*, 114 N. C. 797, 19 S. E. Rep. 220; *Patterson v. Gaines*, 6 How. (U. S.) 550.

² *Lacon v. Higgins*, 8 Salk. 178. But doubtless such proof could not be made in jurisdictions where foreign laws are not permitted to be proved by parol, except that it might be shown by parol testimony just how the marriage was celebrated, and if celebrated according to the common law, which is usually presumed to be in force in all the states, except Louisiana, it would not be good; it would then necessarily follow that it would not be valid in the locality where it is attempted to establish its sufficiency.

³ *In re Drinkhouse's Estate*, 151 Pa.

St. 294, 24 Atl. Rep. 1083; *Crawford v. Blackburn*, 17 Md. 49; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. Rep. 752; *Cope v. Pearce*, 7 Gill (Md.), 247; *Greenwalt v. McEnnelly*, 85 Pa. St. 352; *In re Strauss' Estate*, 168 Pa. St. 561, 32 Atl. Rep. 98; *United States v. Tenny (Ariz.)*, 11 Pac. Rep. 472; *Miles v. United States*, 103 U. S. 304; *Pricket v. Muck*, 74 Wis. 199, 42 N. W. Rep. 256; *Hawes v. State*, 88 Ala. 37, 7 S. Rep. 302; *Floyd v. Calvert*, 53 Miss. 37, 44.

⁴ *Hardenbrook v. Harrison (Colo.)*, 17 Pac. Rep. 72.

⁵ *State v. Behram*, 114 N. C. 797, 19 N. E. Rep. 220.

⁶ *Rooney v. Rooney (Pa.)*, 34 Atl. Rep. 682.

the contract and ceremony.¹ Or the ceremony and marriage may be proven by the testimony of one or both parties thereto, if living.²

§ 110. **Proof of—Formal and informal marriages.**—The great difference between marriages which are celebrated *in facie ecclesiæ* and those entered into informally by agreement of the parties is in the proof of the fact of marriage. In the former case, the ceremony, when duly shown to have been celebrated in manner and form required by law, is conclusive evidence of the marriage and the consent of the parties thereto; while informal marriages may not only be proven by any competent evidence, but may, of course, be established by the like testimony required to prove a ceremonial marriage.³ But even to establish an informal marriage, it is necessary not only to show the actual agreement or recognition of the parties, but this must be followed by the consummation of the future promise. And the cohabitation is not, of itself, enough to consummate the agreement, but must be as man and wife, and in good faith.⁴ When cohabitation follows the promise of marriage, this is *prima facie* evidence of the consent of both the parties to actually become husband and wife, and this will relate back to the

¹ *McAdam v. Walker*, 1 Dow, 148; *State v. Brecht*, 41 Minn. 50, 42 N. W. Rep. 602; *Chew v. State*, 23 Tex. App. 230, 5 S. W. Rep. 373; *United States v. De Amador* (N. M.), 27 Pac. Rep. 488; *Gilman v. Sheets*, 78 Iowa. 499, 43 N. W. Rep. 299; *Odd Fellows Benefit Ass'n v. Carpenter* (R. I.), 24 Atl. Rep. 578; *Lord v. State*, 17 Neb. 526, 23 N. W. Rep. 507; *Commonwealth v. Norcross*, 9 Mass. 492; *Commonwealth v. Hayden*, 163 Mass. 453, 40 N. E. Rep. 846; *Patterson v. Gaines*, 6 How. (U. S.) 550.

² *Commonwealth v. Dill*, 156 Mass. 266, 30 N. E. Rep. 1016; 2 Greenl. Ev., § 461; *McQuade v. Hatch*, 65 Vt. 482, 27 Atl. Rep. 136; *In re Wallace's Estate*, 49 N. J. Eq. 530, 25 Atl. Rep. 260; *Commonwealth v. Hayden*, 163 Mass. 453, 40 N. E. Rep. 846; *Soyer v. Great Falls Water Co.*, 15 Mont. 1, 37 Pac. Rep. 838; *Green v. State*, 59 Ala.

68. But the admissions of the parties as man and wife are not sufficient to establish a marriage where it also appears that they merely lived together for the gratification of passions. *Olson v. Peterson*, 35 Neb. 358, 50 N. W. Rep. 155; *Rose v. Clark*, 8 Paige, 574. And especially is this true in such cases, where one of the parties marries again without obtaining a divorce. *Jones v. Jones*, 45 Md. 144. Likewise, where the parties who so cohabit, permanently separate from each other. *Jackson v. Van Buskirk*, 18 Johns. 345.

³ *Clayton v. Wardell*, 4 N. Y. 230; *Matter of Taylor*, 9 Paige, 611. See *Odd Fellows Benefit Ass'n v. Carpenter*, 17 R. I. 720, 24 Atl. Rep. 578.

⁴ *Hiler v. People* (Ill.), 41 N. E. Rep. 181; *Hebblethwaite v. Hepworth*, 98 Ill. 126; *Stoltz v. Doering*, 112 Ill. 234.

beginning of the cohabitation.¹ This is the case though when the promise of marriage was made one of the parties was under a disability which would preclude the validity of the marriage, where the disability was subsequently removed and the parties continued to live together as husband and wife.²

§ 111. *Lex loci contractus* — General rule.— The general rule of law is, a marriage which is contracted in compliance with the requirements of the law of the place where the agreement is made, and entered into in good faith, will be recognized throughout the civilized world as valid in every sense.³ It is patent from first blush that such a rule is imperatively necessary for the peace of society, the assurance of legitimacy, and the certainty with which a marriage regularly contracted in good faith according to the laws and requirements of the place of contracting may be universally regarded. If it were otherwise, the law of descent, of dower, of curtesy, legitimacy, and the liabilities and duties of the husband to the wife and both to their children and the world, the rights, duties and liabilities of children, and all kindred matters, would be in a state of hopeless confusion. Persons who are married according to the laws of their domicile at the time take with them

¹ *Peck v. Peck*, 12 R. L. 485; *Pearson v. Howey*, 11 N. J. Law, 12.

² *Poole v. People* (Colo.), 52 Pac. Rep. 1025.

³ *Harral v. Harral*, 39 N. J. Eq. 279; *Smith v. Smith*, 52 N. J. Law, 207, 19 Atl. Rep. 255; *In re Lum Lin Ying*, 59 Fed. Rep. 682; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. Rep. 752; *Clark v. Clark*, 52 N. J. Eq. 650, 30 Atl. Rep. 81; *Jackson v. Jackson* (Md.), 33 Atl. Rep. 317; *State v. Ross*, 76 N. C. 242; *Williams v. Oates*, 5 Ired. (N. C.) 535; *Story Confl. Laws*, § 118; *Succession of Callibero*, 24 La. Ann. 573; *Putnam v. Needham*, 8 Pick. (Mass.) 433; *Medway v. Needham*, 16 Mass. 157; *Moore v. Hegeman*, 92 N. Y. 521; *Stephenson v. Gray*, 17 B. Mon. (Ky.) 193; *Shreck v. Shreck*, 32 Tex. 579; *Dumarsley v. Fishly*, 3 A. K. Marsh. (Ky.) 377; *Campbell v.*

Crampton, 2 Fed. Rep. 417, 424; *Scrimshire v. Scrimshire*, 2 Hag. Con. 562; *West Cambridge v. Lexington*, 1 Pick. (Mass.) 505; *Ruding v. Smith*, 2 Hag. 371; *Steadman v. Powell*, 1 Add. Ecc. 58; *Pearson v. Pearson*, 51 Cal. 120; *Fisk v. Fisk*, 34 N. Y. S. 33; *Sutton v. Warren*, 10 Metc. (Mass.) 451; *Hiram v. Pierce*, 45 Me. 367; *True v. Ranney*, 41 N. H. 52; *Westcomb v. Dods*, 1 Lee, 59; *Herbert v. Herbert*, 3 Phil. Ecc. 363; *Dalrymple v. Dalrymple*, 2 Hag. Con. 54; *Dannelli v. Dannelli*, 4 Bush (Ky.), 51; *Van Voorhis v. Britnall*, 86 N. Y. 18; *Boyer v. Dively*, 58 Mo. 510; *Morgan v. McGhee*, 5 Humph. (Tenn.) 13; *Johnson v. Johnson*, 80 Mo. 72; *Redgrave v. Redgrave*, 38 Md. 93; *Fornhill v. Murray*, Bland Ch. 479; *Greenwood v. Curteis*, 6 Mass. 358; *Commonwealth v. Lane*, 113 Mass. 458.

the valid status of the marriage thus contracted into whatever land they may travel or wheresoever they may take up another domicile or abiding place.

§ 112. Lex loci contractus—Rule where the contract is void where made.—As the contract of marriage, if good where made, is generally recognized everywhere as good, on the other hand, if the agreement is not made in compliance with the requirements of the laws of the place of contract, it can take on no validity by the parties going to another country. And this is true though the contract might be valid in such country if the ceremony which was void in the place of the contract had been gone through in the new place. Being void at the place of execution, this blighting effect attends the status and contract of the parties wheresoever they may go.¹

§ 113. Lex loci contractus—Exceptions to the general rule.—However well the general rule of the validity of a contract of marriage, good according to the law of the place of celebration, is established, it is not without its exceptions. These exceptions are found in instances where the laws of the place of contract contravene the positive law or public policy of the state where the marriage is drawn in question. And these exceptions are as firmly fixed in the law as is the general rule itself. In matters of form, age of consent, consent of parents, and all like matters, the courts of one state or country will always yield respect to the laws of another; but when to thus defer to the foreign law of marriage would be to surrender up some positive law of the state of the forum, or deny some rule of state policy adopted for the peace and welfare of the citizens of the state, the courts of such state will adhere to the rules of law of the forum, rather than defer to the laws of the place of contract at the expense of ignoring or repudiating these. Were it otherwise, a state might have to recognize a marriage which, according to its own laws, would be incestuous

¹ *Burrows v. Jenimo*, 2 Str. 732; 2 *quier*, 1 Bin. (Pa.) 336; *Blaisdell v. Kent*, Comm. 458; *Alves v. Hodgson*, Bickum, 139 Mass. 250, 1 N. E. Rep. 7 T. R. 241; *Dyer v. Hunt et al.*, 5 281; *Scrimshire v. Scrimshire*, 2 Hag. N. H. 401; *Desobry, Ex'r, v. Laistre*, Con. 395; *Middleton v. Middleton*, 3 2 Har. & John. 191; *Desebats v. Ber-* Hag. Con. 437.

or polygamous, and therefore contrary to its policy and void, as such marriages may be valid in some jurisdictions.¹

§ 114. *Lex loci contractus* — Rule where the parties go to a foreign jurisdiction to evade the laws of the domicile.— It is not the temporary coming one day and going the next which will constitute a residence or domicile in a country other than that of the *bona fide* domicile which will entitle the person so going to the privileges and benefits of the laws of such country in reference to marriage contracts.² Indeed, as was well said by Sir George Hay: "No country would wish to thus thrust its laws upon another where marriages thereunder are made not only positively void, but highly criminal as well."³ And certainly any rule of law which would permit a citizen of a state to fly for a temporary time to another to celebrate his marriage according to the foreign laws, and instantly return to his home where such a marriage is forbidden, is nothing less than permitting such state to thrust its laws upon the state of domicile; or, which is practically the same, the citizen of a state may not go beyond its confines to evade its marriage laws, marry there and immediately return home to live, and thereby bring with him such foreign laws, as it were, for his special benefit and to control his rule of conduct in the place of the laws of the *bona fide* domicile.⁴ In Massachusetts, however, in an early case where a white person and a negro went to another state to evade the Massachusetts law forbidding such a marriage, it was held that, as the marriage was good in the state where celebrated, it would be recognized by the Massachusetts courts.⁵ Since these early cases in Massachusetts, the law-mak-

¹ Pennegar v. State, 87 Tenn. 244, 10 S. W. Rep. 305; Wilbur v. Bingham, 8 Wash. 35, 35 Pac. Rep. 407; Campbell v. Crampton, 2 Fed. Rep. 417; Babin v. Leblanc, 12 La. Ann. 367; Maillefer v. Saillot, 4 La. Ann. 375; Succession of Hernandez, 46 La. Ann. 962, 15 S. Rep. 461; State v. Bell, 7 Baxt. (Tenn.) 9; State v. Kennedy, 76 N. C. 251; s. c., 5 Cent. L. J. 391; 31 Am. Law Rev. 524.

² Harford v. Morris, 2 Hag. Con. 423; 31 Am. Law Rev. 524.

³ Harford v. Morris, 2 Hag. Con. 423.

⁴ Williams v. State, 5 Ired. (N. C.) 535; State v. Bell, 7 Baxt. (Tenn.) 9; True v. Ranney, 41 N. H. 52, 55; Regina v. Chadwick, 11 Q. B. 173; Harford v. Morris, 2 Hag. Con. 423; Brook v. Brook, 9 H. L. 193; Kinney v. Commonwealth, 30 Gratt. (Va.) 858; Mette v. Mette, 1 Sw. & Tr. 416. See also Gordeur v. Lewis, 7 Gill (Md.), 377; Norman v. Norman (Cal.), 54 Pac. Rep. 143.

⁵ Medway v. Needham, 16 Mass. 157; Putnam v. Sylvanus, 8 Pick. (Mass.) 433. See also Stephenson v. Gray,

ing authority, doubtless impressed with the evils which might flow from the rule announced in these decisions, enacted a law providing that "when persons resident in this state, in order to evade the preceding provisions — provisions forbidding those who have a former husband or wife living, and those related to each other within certain degrees of consanguinity and affinity, to marry, and declaring such marriages void absolutely,— and with an intention of returning to reside in the state, and afterwards return and reside here, the marriage shall be deemed void in this state."¹ This statute made the law practically what it has always been recognized to be by the best authorities. Before its enactment it had been held in Massachusetts that the marriage of a man with his mother's sister, though void under the law of Massachusetts, was nevertheless good when celebrated in a state tolerating such marriages.² But these early Massachusetts cases received severe criticism in the House of Lords in the leading case of *Brook v. Brook*.³ In this case, one Brook, married in Yorkshire, England, and had two children. The wife of this marriage died there in 1847. In 1850 he was again married, while in Denmark, to the lawful sister of the first wife, which was permissible under the laws of Denmark. At the time of the marriage in this country the parties were both lawfully domiciled in England, were subjects of that kingdom, and had only gone to Denmark on a temporary trip. Upon an issue as to the validity of this marriage in England, it was shown that the marriage was regular in Denmark; but by the law of England, the marriage of a man with his deceased wife's sister was absolutely void as incestuous and contrary to the divine law. "The question," said Lord Campbell, for the court, "whether the marriage celebrated in 1850, in the duchy of Holstein, in the kingdom of Denmark, between William L. Brook a widower, and the sister of his deceased wife, they being subjects and then domiciled in England, and contemplating England as their matrimonial place of residence,

17 B. Mon. (Ky.) 193; *State v. Ross*,
76 N. C. 242; *Van Voorhis v. Britnall*,
86 N. Y. 18; *Moore v. Hegerman*, 27
Hun, 68; s. c., 92 N. Y. 521; *Ilderton*
v. Ilderton, 2 H. Bl. 145, 147; *Smith*
v. Smith, 52 N. J. Law, 207, 19 Atl.
Rep. 255.

¹ *Commonwealth v. Lane*, 113 Mass.
458.

² *Sutton v. Warren*, 10 Metc. (Mass.)
451.

³ 9 H. L. 193.

is to be considered void in England; marriage between a widower and the sister of his deceased wife being permitted by the law of Denmark. . . . There can be no doubt of the general rule that 'a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere.' But where the forms of entering into a contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the *essentials* of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage and in which the matrimonial residence is contemplated; although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good anywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated." This language of the learned English court correctly reflects the law of the subject.¹

¹The case of *Marshal v. Marshal*, 4 Thomp. & C. 449, maintains the same doctrine, and notices with unequivocal approval the case of *Brook v. Brook*, 9 H. L. 193, where the validity of a marriage celebrated in another state was at issue. A judgment for divorce had been rendered against one Marshal for his adultery, and in the decree he was forbidden to marry again within the life-time of his first wife, under a statute branding all marriages void which might be contracted in violation of such decree. Marshal fled to an adjacent state and was again married, returning immediately to the state of his domicile and residence, and taking up his abode as usual. It seems that the second wife did not prove a better partner in the affairs of life than he had been adjudged to have been in the matter of the first marriage, so he brought an action against No. 2

on the ground of adultery. The court properly held the second marriage void, and the complainant in contempt for violating the decree forbidding him to marry again during the life of the first wife. In this interesting and well-considered case, Judge Westbrook, speaking for the supreme court of New York, said: "We assume, then, that so far as it is possible for this state to protect itself against a marriage such as this plaintiff has contracted, by the force of express legislation it has done; and if the courts of this sovereignty are bound to respect and hold valid that which its own legislation has declared absolutely void, and to so hold in favor of one of its citizens who, at the time he did the forbidden act, as such citizen owed to its laws allegiance and obedience, then it may well be doubted whether it is able to protect its own morals or the sancti-

§ 115. *Lex loci contractus*—Status of marriages contracted in foreign jurisdictions—Statutory changes in the law.—In Nebraska it is provided by statute that “All marriages contracted without this state, which would be valid by the law of the country in which the same were contracted, shall be valid in all courts and places in this state.”¹ And a like statute is in force in Utah and California.² Such statutes are perhaps little more than a re-enactment of the almost universally recognized common law on the subject, though, taken in their rigidly strict sense, may be regarded as an enlargement of the same. But even under such statutes, marriages which are celebrated elsewhere, and are valid and regular where celebrated, nevertheless will be held void where they are declared void by the law of the domicile, as being incestuous, polygamous, contrary to nature or to the public policy or positive law of the state where questioned.³

§ 116. *Lex loci contractus*—Status of marriages contracted in foreign jurisdictions not in conformity to the foreign laws.—The general rule is, a marriage void where celebrated is void everywhere, and if valid where contracted is good everywhere. In case parties are married in a foreign jurisdiction, however, and the ceremony is not in conformity to the laws of the foreign country, the relation will nevertheless be upheld if the requirements of the law of the forum were observed in contracting the marriage in the foreign country.⁴

ties of the married state within its own limits. Nay, it is a matter of no doubt whatever; for if the principle contended for by the plaintiff in this case is sound, then all marriages depend upon the will of the parties who assume these obligations, and new alliances can be again contracted and those ties again sundered as may suit the will or caprice of either. Of the soundness of this doctrine, there can be, it seems to us, very little question, unless the state is prepared to surrender its own sovereignty, and place its laws regulating marriage relations entirely at the mercy of other states or countries.” The learned editor of the American Decisions, in a

note to the case of *Medway v. Deedham*, 16 Mass. 157, reported in volume 8, American Decisions, maintains the correctness of the law as announced in the language of Judge Westbrook. And the learned Mr. Wharton maintains the same contention. Wharton, *Conf. Laws*, § 490.

¹ Stat. Neb. 1887, § 17, p. 505; *Gibson v. Gibson*, 24 Neb. 394, 39 N. W. Rep. 450; *Goodrich v. Cushman*, 34 Neb. 460, 51 N. W. Rep. 1040.

² Comp. Laws Utah, § 2587; Civil Code Cal., § 63.

³ *Pearson v. Pearson*, 51 Cal. 120, 126.

⁴ *Ilderton v. Ilderton*, 2 H. Bl. 145, 147; *Smith v. Smith*, 52 N. J. Law, 207, 19 Atl. Rep. 255; *Norcross v.*

But of course if any of the vital requisites of the marriage, such as want of age, mental or physical capacity, relation, etc., forbid the validity of the contract where it is entered into, it will be regarded as invalid for these reasons everywhere.

§ 117. Domicile of parties — Laws of, govern to what extent.— When persons enter into a contract of marriage they are presumed to have in view the law of the place where the contract is to be fulfilled, and not necessarily that of the residence of either party for the particular time being. So, where a marriage was celebrated in New York, one of the parties at the time being a *bona fide* resident domiciled in Louisiana and the other of Paris, France, both intending to leave immediately after the ceremony for Louisiana to make that state their future permanent home, the marriage was held to be good in Louisiana, though because one of the parties had obtained a divorce which would have avoided the marriage under the laws of New York, where the nuptials were actually celebrated.¹ Here it is manifest that neither party contracted the marriage with the laws of New York in view, but rather those of Louisiana, where the head of the family lived, and where both intended to go at once to take up their abode and live under the laws of that state.²

§ 118. Conflict of laws — Extraterritorial effect of penal laws in regard to contracts of marriage.— It is generally held that the penal laws of one state forbidding marriages have no effect beyond the boundaries of such state. No state will attempt to enforce such laws of another state; and the fact that a marriage might be penal where celebrated will not make it invalid in another state, especially where it is clear that the parties did not make the contract with reference to the laws of such state making the contract penal.³ This theory is

Norcross, 155 Mass. 425, 29 N. E. Rep. 506; Lloyd v. Lloyd, 2 Curt. Ecc. 251. The decision in this last case, however, was grounded chiefly on the statute 4 Geo. 4, c. 91 (1823), known as the Marriage Act, as well as upon that of 4 Geo. 4, c. 67. instructive on this point, Arnold v. Chesebrough, 58 Fed. Rep. 833, 7 C. C. A. 508, 11 U. S. App. 792; Harford v. Morris, 2 Hag. Con. 423.

² See article by the author, 31 Am. Law Rev. 525.

³ Moore v. Hegeman, 92 N. Y. 521; Thorp v. Thorp, 90 N. Y. 602; Succession of Hernandez, 46 La. Ann. 962, 15 S. Rep. 461. See also, as

Succession of Hernandez, 46 La. Ann. 962, 15 S. Rep. 461. See also, as

strengthened, too, by reason of the well-recognized legal principle that a contract is to be construed, as respects its binding force, according to the law of the place by which the parties themselves intended it should be governed. It may be made in one state with the express agreement that it is to be performed under the laws of another. And the law of the domicile of either party may be agreed upon when the contract is actually and in good faith to be carried out there. When this is done, the laws of the place of making the contract have no application.¹

§ 119. Conflict of laws — Presumptions as to laws of foreign country.— Where the validity of a marriage celebrated in a foreign country is brought in question, the rule for ascertaining the status thereof is to presume that the laws of the country where the contract is made are the same as those of the forum. It is otherwise, however, where such foreign laws are affirmatively shown to be different under the rules of evidence in such cases.² If it becomes necessary to show a valid marriage according to the laws of another state or country whose laws are different from those of the forum, it is incumbent on the party relying on such laws to establish the validity of the marriage to introduce them in evidence in the regular way. While the laws of one country will be presumed the same as those of the forum, courts do not take judicial notice of the laws of other countries.³ Though it is a familiar rule in

15 S. Rep. 461; *Van Voorhis v. Britnall*, 86 N. Y. 18; *Scoville v. Canefield*, 14 Johns. 338; *Story, Confl. Laws*, § 621.

¹ *Butters v. Old*, 11 Iowa, 1; *Arnold v. Potter*, 22 Iowa, 194; *Peck v. Mayo*, 14 Vt. 33, 38; *Robinson v. Bland*, 2 Burr. 1077; *Story, Confl. Laws*, § 280; *Wayman v. Southard*, 10 Wheat. 48; *Phil. Int. Law*, 469; *Scott v. Perlee*, 39 Ohio St. 63; *Jones, Com. Contracts*, § 21; *Lloyd v. Guibert*, L. R. 1 Q. B. 120; *Leberton v. Miles*, 8 Paige, 261; *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. Rep. 102; *Kellogg v. Miller*, 13 Fed. Rep. 198; 2 Kent, Comm. 459; *Andrews v. Pond*, 13 Pet. 65; *Strothers v. Lucas*, 12 Pet. 410, 436, 437; *Bowles v. Eddy*, 33 Ark. 645, 648;

Scudder v. Union Nat. Bank, 91 U. S. 406; *Liverpool & Great Western Steam Boat Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 409; *Wharton, Confl. Laws*, § 170; *Ferguson v. Fyffe*, 8 C. & F. 120; *Don v. Lippman*, 5 C. & F. 1; *Succession of Hernandez*, 46 La. Ann. 962, 15 S. Rep. 461; *Gates v. Gather*, 46 La. Ann. 286, 15 S. Rep. 50.

² *People v. Loomis* (Mich.) 64 N. W. Rep. 18; *Crane v. Hardy*, 1 Mich. 56; *Hynes v. McDermott*, 82 N. Y. 41; *In re High*, 2 Doug. (Mich.) 515; *Haggin v. Haggin*, 35 Neb. 375, 53 N. W. Rep. 209.

³ *Gardner v. Lewis*, 7 Gill (Md.), 387; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. Rep. 752.

the American states that while the statutes of another state will not be noticed judicially, yet the courts of one state will usually presume that the common law is in force in another.¹

§ 120. **Incestuous marriages — Definition of incest.**— In order that a more intelligent discussion of the subject of incestuous marriage may be had, it will be well to notice the meaning and definition of the term “incest.” This is defined by Bouvier to be “the carnal copulation of a man and a woman related to each other within any of the degrees within which marriage is prohibited by law.”² The word is defined by the supreme court of Michigan as follows: “Incest means, in all cases, illicit intercourse between persons within the degrees of consanguinity within which marriages are forbidden by law.”³ Again, an incestuous person is one guilty of incest. An incestuous cohabitation or intercourse is a cohabitation or intercourse between persons related within the degrees of consanguinity within which marriage is prohibited. So, the term “incestuous” is a proper one to apply to a marriage between persons related to each other within the forbidden degrees.⁴ The crime of in-

¹ Hydrick v. Burke, 30 Ark. 124.

² Bouvier's Law Dict., “Incest.”

³ Daniels v. People, 6 Mich. 381, 386. This definition would have been more correct if the word “illicit” had been omitted. It is not necessary for intercourse to be illicit for it to be incestuous. If the sexual connection is between persons who are related within the forbidden degrees, it is incest. Were it otherwise, intercourse between a father and daughter, or mother and son, would not be incest if they were but married.

⁴ State v. Hertges, 55 Minn. 464, 57 N. W. Rep. 205; Territory v. Corbett, 3 Mont. 50, 55. In this last case the defendant was indicted under the following statute: “Persons within the degrees of consanguinity within which marriages are declared to be incestuous and void, who shall intermarry with each other, or who shall commit fornication or adultery with each other, shall, on conviction, be

punished by imprisonment in the territorial prison not less than one nor exceeding ten years.” It was insisted by the defendant that the laws of the territory did not, in express terms, declare any marriage incestuous and void, and that, without such a law, the statute under which the indictment was found must be regarded as a nullity. But there was also a statute providing that “no marriage shall be contracted while either of the parties shall have a husband or wife living, nor between parties who are nearer of kin than second cousins, computing by the rules of the civil law, whether by the half or whole blood.” To the objection assigned the court was of the opinion that any contract entered into which is expressly prohibited by statute is void. That the prohibition of the statute itself in effect declares it absolutely void.

cest, whether in cases of persons married who are related within the forbidden degrees or not, is an enormous one, and is generally made a felony in this country by statute. In England, however, under the common law, the offense was left to the mild control of the spiritual courts.¹ As incestuous marriages are usually branded as void in this country, it necessarily follows that a person guilty of violating the divine precept, adopted by law, forbidding marriages within the named degrees of relationship, cannot screen himself from the ignominy, as well as penal consequences of his act, by pleading his marriage with the person with whom his intercourse is forbidden.

§ 121. Incestuous marriages—Degrees of relationship.—In England it is provided by statute,² “That no subjects of this realm, or in any of his majesty’s dominions, shall marry within the following degrees: A man may not marry his mother or step-mother, his sister, or son’s or daughter’s daughter, his father’s daughter by his step-mother, his aunt, his uncle’s wife, his son’s wife, his brother’s wife, his wife’s son’s wife, his wife’s son’s daughter, his wife’s daughter, his wife’s sister.” It will be seen that some of the degrees of affinity are embraced in this statute. According to the Levitical law, the husband and wife being “one flesh,” there was no distinction made between persons related by affinity and by consanguinity.³ The forbidden degrees as laid down in the English statute follow closely after the divine precept contained in the eighteenth chapter of Leviticus. And by another statute,⁴ marriages contrary to divine precept are expressly forbidden.⁵ In the American states, too, practically the same degrees of kindred are adopted as being an impediment to marriage because of relationship, though there is slight difference in nearly all of them. The controlling aim, however, is to brand as null and void and, it might be added, infamous, all marriages which transgress this divine inhibition, sanctioned, substantially at least, in all Christian countries.

§ 122. Incestuous marriages—Status of.—In England, all marriages which were forbidden by law as incestuous were

¹ 4 Bl. Comm. 64.

⁴ 38 Hen. VIII, ch. 38.

² 25 Hen. VIII, ch. 22, § 3.

⁵ Co. Litt. 235a, note 1.

³ 1 Bl. Comm. (Cooley’s ed.) 435, note 5.

considered voidable only, until a sentence of nullity was pronounced by the ecclesiastical courts. They were so regarded in all the courts until such sentence was had in the spiritual tribunals.¹ And the sentence of nullity had to be pronounced during the life of the parties, else the marriage would be regarded as good for all civil purposes. It was thought that no good purpose could be served by annulling a marriage, merely voidable, after the death of one of the parties.² The death of a man's wife would not authorize his marriage to his wife's sister, aunt, niece or other relative, which it would have been lawful for him to marry had his first marriage been valid, though it might not be annulled because of incest. As the marriage in the first instance has not been annulled, and it being good for all civil purposes after the death of one of the parties, the right of the survivor to marry a relative of the other must be determined upon the theory that the first marriage was valid.³ A contrary rule, however, has been announced in Texas.⁴ But this seems to be clearly against the best reasoning as well as the pronounced weight of authority. If it be unlawful for a man to have connection with his wife's sister during her life, it is difficult to see how the situation can be improved after her death. The sister to the first wife is still the sister-in-law, just as the blood relatives of the man remain the same. But it is now provided by statute in England,⁵ in order to fix and firmly settle the status of persons who marry within the prohibited degrees of an earlier statute,⁶ and because of the rulings that such marriages must be deemed valid from a civil standpoint unless dissolved during the life of the parties, that "all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and

¹ *Aughtie v. Aughtie*, 1 Phil. Ecc. 201; 1 Bl. Comm. 434.

² *Aughtie v. Aughtie*, 1 Phil. Ecc. 201; *Elliott v. Gurr*, 2 Phil. Ecc. 16; *Parker's Appeal*, 44 Pa. St. 309; 1 Bl. Comm. 434.

³ *Blackmore v. Brider*, 2 Phil. Ecc. 359; 1 Bl. Comm. 434; *Spear v. Robinson*, 29 Me. 531, 545; *Commonwealth v. Perryman*, 2 Leigh (Va.),

717. In the last case, which arose under a law forbidding a man to marry his brother's wife under certain criminal penalties, it was held that he was subject to prosecution for marrying his brother's widow.

⁴ *Johnson v. State*, 20 Tex. App. 609.

⁵ 5 & 6 Will. 4, ch. 54, known as Lord Lyndhurst's Act.

⁶ 25 Hen. VIII., ch. 22.

void to all intents and purposes whatever." This, of course, makes the status of such marriages very clear according to the modern law of England. And the same may be said as to such status under the laws of the various American states, as these forbidden marriages in this country are condemned by statute as void.¹

§ 123. Incestuous marriages — Curative laws — Power of the legislature to make valid.— As the law-making authority has the power, in the exercise of its legitimate police power, to prescribe what degrees of relationship, if any, shall blight a marriage in violation thereof as void, it likewise has the power to make valid any marriage that may, by reason of the forbidden relations of the parties, be branded as of no force or effect. And as the authority to declare the marriage good exists, the authority carries with it the power to make legitimate the children of the void marriage who would otherwise be bastards.² Indeed, the validating of the marriage would, *ipso facto*, have the effect of legitimating the issue.

§ 124. Incestuous marriages — Marriage of uncle and niece — Validity and status of.— A marriage between an uncle and niece in South Carolina is held to be so far valid that the children thereof may inherit where the relation has not been dissolved in the life-time of the parties.³ This is upon the theory that the contract of marriage is only a civil contract; that the courts in this country have no jurisdiction like that of the spiritual courts of England; but that the marriage of an uncle and niece, which has not been dissolved during the life-time of the parties, is at least sufficient to enable the wife to take a distributive share in the husband's estate, such marriage not being expressly prohibited by law as void in this state.⁴ But this rule

¹ In New Jersey a statute provides that persons related within certain degrees shall not marry; but the marriage is not expressly declared to be void. The law here also provides for a divorce in such cases. This being true, it is held in this state that such a marriage will be regarded as valid until annulled. *Boylan v. Deinzer*, 45 N. J. Eq. 485, 18 Atl. Rep. 119. In practically all the states, however, these marriages are not only forbidden, but are branded as null and void.

² *Moore v. Whitaker*, 2 Harr. (Del.) 50.

³ *Bowers v. Bowers*, 10 Rich. (S. C. Eq.) 551.

⁴ A like doctrine under a similar law was laid down in Illinois in an

could not obtain where the marriage by positive law is declared void, as this would be to override the statute itself.

§ 125. Incestuous marriages — Degrees of relationship — Method of computation.—The learned Chancellor Kent gives the following correct rule for computing the degrees of kinship: “In the mode of computing the degrees of consanguinity, the civil law, which is generally followed in this country upon that point, begins with the intestate and ascends from him to a common ancestor, and descends from the ancestor to the next heir, reckoning a degree for each person as well in the ascending as descending lines. According to this rule of computation, the father of the intestate stands in the first degree, his brother in the second, and his brother’s children in the third. . . . In the canon law, which is also the rule of the civil law, in tracing title by descent the common ancestor is the *terminus a quo*. The several degrees of kindred are deduced from him. By this method of computation the brother of A. is related to him in the first degree instead of in the second, according to the civil law, for he is but one degree removed from the common ancestor. The uncle is related to A. in the second degree; for though the uncle be but one degree from the common ancestor, yet A. is removed two degrees from the grandfather, who is the common ancestor.”¹ The *consanguinei* of the wife are the *affines* of the husband, and *vice versa*; but the *affines* of the wife are not those of the husband, nor the *affines* of the husband those of the wife.² And where two men marry sisters they become related to each other in the second degree of affinity, just as their wives are related within the second degree of consanguinity.³ —

§ 126. Incestuous marriages — Relationship by the half and whole blood.—Persons who are related to each other within the prohibited degrees branding the marriage incestuous cannot contract marriage because related only by the half

early case. *Bonham v. Badgley*, 2 N. E. Rep. 986; *Higbe v. Leonard*, 1 Gilm. (Ill.) 622. See also, *Co. Litt.* 33a; *Denio*, 186; *Paddock v. Wells*, 2 Barb. 1 Bl. Comm. 434; *Harris v. Hicks*, Ch. 331. Salk. 548.

¹ 4 Kent, Comm. 412, 413.

² *Chinn v. State*, 47 Ohio St. 575, 26 338.

³ *Foot v. Morgan*, 1 Hill (N. Y.), 654; *Paddock v. Wells*, 2 Barb. Ch. 331,

blood. The kinship by the half blood is the blood relation nevertheless, and the policy of the law forbids, with like effect, all marriages where the relationship is by the half blood, just as though the full blood relation existed.¹

§ 127. Incestuous marriages — Bastardy — Effect of.— While at common law a bastard is regarded as *nullius filius*, and as “the first of his family,” yet this only has reference to civil matters, such as his right of inheritance, of support from parents, and like rights and privileges. The law holds those who are illegitimate to the same standard of morality as is required of such as are in every way legitimate. Bastards, therefore, are forbidden to marry within any of the degrees within which it would have been unlawful for them to marry had they been born in lawful wedlock.² For though they may be illegitimate in the eye of the law, yet they are in fact related in blood to their kin, just as those begotten and born in lawful wedlock. The same reasons exist, therefore, for forbidding a marriage of a bastard with one to whom he is actually related within the forbidden degrees as though he were legitimate in fact.

§ 128. Incestuous marriages — Marriages contrary to nature.— It is the firmly-fixed policy of the law in this country that all marriages between persons who are ascendants or descendants in the line of consanguinity, or between brothers and sisters in the collateral line, are positively void *ab initio*. This is the rule at common law, because such marriages are deemed contrary to nature, revolting to the sense of propriety as well as of decency, and repugnant to the law of God.³ An

¹ *People v. Jenness*, 5 Mich. 305; *State v. Wyman*, 59 Vt. 527, 8 Atl. Rep. 900; *State v. Reedy*, 44 Kan. 190, 24 Pac. Rep. 66; 2 Kent, Comm. 422; *Simon v. State*, 31 Tex. Cr. App. 186, 20 S. W. Rep. 716; *Shelley v. State*, 95 Tenn. 152, 31 S. W. Rep. 492. See also *Gardner v. Collins*, 2 Pet. 58; *Cowper v. Cowper*, 2 P. Wms. 720; *Smith v. Tracey*, 2 Mod. 204; *State v. Ginton* (La.), 24 S. Rep. 784.

² *Queen v. Chafin*, 3 Salk. 66; *Peo-*

ple v. Jenness, 5 Mich. 305; *Morgan v. State*, 11 Ala. 289; *Baker v. State*, 30 Ala. 521; *Hains v. Jeffel*, 1 Ld. Raym. 68; *People v. Lake*, 110 N. Y. 61, 17 N. E. Rep. 146.

³ *Campbell v. Crampton*, 2 Fed. Rep. 417, 426; *Wightman v. Wightman*, 4 Johns. Ch. 343. This latter is regarded as a leading case, in which Chancellor Kent appropriately observed: “I have hypothetically mentioned the case of a marriage between

important public policy lies at the foundation of this principle. Whether from a scientific or metaphysical standpoint, the offspring of those who are closely related to each other by the ties of consanguinity are predisposed to mental or bodily deformity of any kind. The law forbids these marriages, not because, alone, of the probability or possibility of such a result following, but because, as well, the very idea is revolting to the unwritten law of society as well as contrary to the divine. Such marriages are odious in the eyes of all decent people, and are almost universally condemned as revolting.

§ 129. Incestuous marriages — Mistake of fact.— It sometimes happens that persons join themselves in matrimony, who are forbidden by law to marry because related within the pro-

persons of direct lineal line of consanguinity as clearly unlawful by the law of the land, independent of any church canon or of any statute prohibition. That such a marriage is criminal and void by the law of nature is a point universally conceded. And by the law of nature I understand those fit and just rules of conduct which the Creator has prescribed to man, as a dependent and social being, and which are to be ascertained from the deductions of right reason, though they may be more precisely known and more explicitly declared by divine revelation. There is one other case in which the marriage would be equally void *causa consanguineatis*, and that is the case of brother and sister; and since it naturally arises in the consideration of this subject, I will venture to add a few incidental observations. I am aware that, when we leave the lineal line and come to the relation by blood or affinity in the collateral line, it is not so easy to ascertain the exact point at which the natural law has ceased to discountenance the union. Though there may be some difference in the theories of different writers on the law of nature in regard to this subject,

yet the general current of authority, and the practice of civilized nations, and certainly of the whole Christian world, have condemned the connection in the second case, which has been supposed, as grossly indecent, immoral and incestuous and inimical to the purity and happiness of families, and as forbidden by the law of nature. . . . And whatever may have been the practice of some ancient nations, originating, as Montesquieu observes, in the madness of superstition, the objection to such marriages is undoubtedly founded in reason and nature. It grows out of the institution of families, and the rights and duties, habits and affections flowing from that relation, and which may justly be considered as a part of the law of our nature as rational and social beings. Marriages among such near relations would not only lead to domestic licentiousness, but, by blending in one object duties and feelings incompatible with each other, would perplex and confound the duties, habits and affections proceeding from the family state, impair the perception and corrupt the purity of moral taste, and do violence to the moral sentiments of mankind."

hibited degrees, under a mistake of fact. But a mistake of this kind, however innocent, could not validate a marriage. An instance of a brother and sister becoming thus man and wife has been recorded. Relatives are often separated from each other in many ways for years, and frequently all trace of the absent one is lost. In all such cases there could be no criminal responsibility, for the intent, the gist of a crime, is lacking. But this is not true as to the civil aspect of the law prohibiting such marriages. It is the relation, not the knowledge or want of knowledge in the parties of the real facts, nor the intent or lack of intent to violate the law, which controls the status of the parties. If within the forbidden degrees, the marriage must be deemed void; and unless there be a saving statute the issue of such a marriage would be illegitimate. No other conclusion could reasonably follow. So, where consent to a marriage is brought about by a mistake of fact as to one of the parties, it is not valid. This rule finds support in the elementary principle that consent alone can give validity to a contract of any kind, and consent superinduced by mistake or fraud is not legal consent. So, if a marriage is contracted by mistake of one of the parties, and is not followed by cohabitation, and being intended to take effect at some future time and then to be attended by a public ceremony of some kind, it will not be binding until such time.¹ And generally a court of equity would relieve the mistaken party from the effect of the error where it was of a nature necessary and material to the contract. But no doubt such relief would be more reluctantly granted after cohabitation, and would be refused if cohabitation were to follow after a discovery of the mistake.

§ 130. Change of nationality by marriage.—The marriage of a person to an alien does not, *ipso facto*, change the allegiance of such person to the laws of the country where, by birth as well as adoption, he or she has become a citizen thereof. But where a woman marries an alien and leaves the country of her citizenship and takes up her abode with her husband in a foreign land, she thereby loses her established citizenship and becomes a citizen of the foreign country.² Generally the disabilities of coverture apply to the civil rights of the wife and are meant

¹ Clark v. Clark, 13 Vt. 460.

² Shanks v. Dupont, 8 Pet. 242.

for her protection. But the political rights of a wife are governed by the law of nations; and by this law she may effect a change of her allegiance by abandoning her country and taking up a citizenship with her husband under his government.¹

§ 131. **Status pending appeal in divorce proceedings.**—By statute, in Washington, the marriage of either party to a decree of divorce during the time within which an appeal may be taken is forbidden. And if one marries in disregard of this monition, the contract will be void.² What would be the status of such a marriage in the absence of a statute on the subject is a more difficult question. Doubtless it would be valid so long as the decree of divorce is not reversed by the appellate court, upon the familiar principle that all judgments of superior courts of record are valid and binding until annulled, modified or reversed by some appellate tribunal. But in the event of a reversal of the decree of divorce, the second marriage would become void, doubtless, just as in cases where one marries after an absence for seven years from the other. In this latter case the first marriage would be valid if the absent one should return, and the marriage in the meantime would have to yield to the prior one. But if the divorce proceedings are regular, a second marriage may be contracted before the actual entry of the decree on the record; for it is the consideration and judgment of the court, not the ministerial act of spreading the court's conclusions upon record, which authorizes the marriage.³

§ 132. **Decree of nullity — Effect of.**—The decree of a court of competent jurisdiction annulling a marriage is simply a judicial determination of the status of the parties. Such a decree does not make the marriage void, but simply adjudicates that it has never had an existence; for a marriage that is void cannot be rendered valid by a failure to sue for its nullity.⁴ But while it is not absolutely necessary that a marriage void *ab initio* be so declared by the courts, yet it is well to have

¹ Shanks v. Dupont, 3 Pet. 242;
Smith v. Sun Printing and Pub.
Ass'n, 55 Fed. Rep. 240, 5 C. C. A. 91.

² In re Smith's Estate, 4 Wash. St.
702, 30 Pac. Rep. 1059.

³ Eichhoff v. Eichhoff, 101 Cal. 600, 36
Pac. Rep. 11.

⁴ Eichhoff v. Eichhoff, 101 Cal. 600,
36 Pac. Rep. 11; Bouzer v. Ricketts,
1 Hag. Con. 214; Perry v. Perry, 3
Paige, 501.

such decree at the first convenient opportunity when a marriage is supposed to be void, as the decree binds the parties and definitely and conclusively fixes their status;¹ though, when undisputed facts show a marriage to be void, no rights or duties can arise by reason of the attempted union, and, strictly speaking, such a marriage cannot be dissolved or annulled by the decree of any court. The effect of such a decree is simply to declare that there is no marriage, not to dissolve one, for there is none in existence to dissolve.

§ 133. **Voidable marriages—Status of.**—A voidable marriage is a marriage *de facto*, and confers upon the parties thereto all the rights, duties and privileges of the marital state, subject only to a decree of dissolution by a court of competent jurisdiction. And until such decree is rendered, the marriage is as valid and binding in law as though originally regular in every essential feature. But when the decree of dissolution is pronounced, it relates back to the time of the marriage, and it then becomes, at common law, void *ab initio*. The facts which make a marriage voidable usually exist at the time of the marriage; and when these are the ground of its nullity, the sun-dering of the relation judicially reaches back to the commencement.² And under the ecclesiastical law of England, if such a marriage is dissolved during the life of the parties, the issue thereof is bastardized.³ In fact, this is the rule of the common law, as the decree establishes the void qualities of the marriage, and it is elementary that the issue of a marriage which is void is not legitimate; for, at common law, the issue must take its legitimacy from the validity of the contract of marriage.

§ 134. **Estoppel.**—In all cases where, by reason of the conduct of a party to an alleged marriage, it would be contrary to equity and good conscience for him to deny the relation, he will be precluded from so doing by reason of the wholesome rule of equitable estoppel. So, where a man and woman recognize each other as husband and wife, and so hold themselves out to their friends and the world, where they cohabit and live as married persons and have children whom they recognize as

¹ *Wightman v. Wightman*, 4 Johns. Ch. 343.

² *Perry v. Perry*, 2 Paige, 501.

³ *Elliott v. Gurr*, 2 Phil. Ecc. 16.

valid, one or both of the parties will then be estopped to set up the invalidity of the marriage.¹ Likewise, a party to a marriage which is not binding cannot secretly withhold his consent, treat the marriage as valid, and then complain of its invalidity at his pleasure. His conduct in thus knowingly recognizing it will estop him from assailing its validity. Otherwise, he would be permitted to take advantage of his own misleading conduct—a thing equity never tolerates.²

§ 135. Is a good consideration.—Of all considerations, marriage is probably the most valuable, and is always so recognized by the law. Its worth, indeed, is not to be measured in dollars and cents, but the benefits of the married state are so many and so well recognized that they are always regarded in law as a good and valuable consideration.³ One of the most usual modes of recognizing marriage as a consideration is in the settlement of property by one party upon the other in consideration of the agreement and its consummation. But the consideration is valid in any other kind of a transaction just as well. In fact, whenever any consideration is sufficient, a consideration of marriage is also good and valid. It is a consideration favored in law, and will support all contracts, obligations, undertakings and any other means whereby a liability is incurred or a thing of value is parted with in return therefor. Rarely could such a consideration be fraudulent, for it is supposed to be adequate for any purpose where a consideration is required. Indeed it is a consideration above either a money or property value. When a ground for the transfer of property, such transaction cannot be assailed as voluntarily, though it might be vulnerable to such an attack when love and affection is the only moving consideration.

§ 136. Indissoluble qualities of.—The general rule of contracts is, the minds of the parties must meet on the thing to be done. And, while this is true, the same agreement which can make a contract can also undo it. That is, the parties who

¹ Applegate v. Applegate, 45 N. J. (S. C. Eq.) 264; Verplank v. Sterry, 12 Eq. 116, 17 Atl. Rep. 293.

² Everett v. Everett, 76 Hun, 146, 23 N. Y. S. 377. Johns. 535; Bradish v. Gibbs, 3 Johns. Ch. 523; Wood v. Jackson, 8 Wend. 9; Tabb v. Archer, 3 Hen. & Munf.

³ Tunno v. Trezevant, 2 Desaus. (Va.) 399.

have bound themselves by a contract may, by mutual consent, if they see fit, dissolve and annul it. The exception to this rule, however, is found in contracts of marriage. These, when regularly entered into, the parties being competent to contract marriage, can never be annulled by any act short of death or the sentence of a court of competent jurisdiction. This rule has its foundation in the necessities of the case, and the peculiar relation incident to the married state. The usefulness of this relation to the state and to society would be practically lost if the parties, or either of them, might dissolve the relation at pleasure.¹ For these and other reasons, therefore, the law wisely forbids the dissolution of such a relation and status at the mere caprice or option of the parties or either of them. For could this be done, it would be in the power of the parties to relieve themselves from their marital duty to each other, their offspring, to society, and to the state, and thereby bring about an alarming condition of things.

§ 137. Annulment of—Conviction of one of the parties of an infamous crime.—It is generally provided by statute in the various states that the conviction of one of the parties to a contract of marriage either has the effect of dissolving the relation *ipso facto*, or furnishing ground upon which a divorce may be had. So, under a statute where the sentence of one of the parties to imprisonment for life has the effect of dissolving the marriage, it is held that the reversal of the judgment of conviction does not restore the marital status, the statute also providing that “no pardon granted by the party so sentenced shall restore such party to his or her conjugal rights.”² Among the reasons for this rule is that the convicted party is forever disgraced, and by law is deprived of the ability to support his family. And further, his continued status as a husband or father or both would be a living disgrace to both wife and children.

§ 138. Legislative regulation of.—The legislative branch of the government has no power to pass laws entirely forbidding

¹ *Fisk v. Fisk*, 34 N. Y. S. 33; *Farr v. Farr*, 2 MacArth. (D. C.) 35; *Van Voorhis v. Britnall*, 86 N. Y. 18; *Hop-*

per v. Hopper, 86 N. Y. S. 610; *In re Denick's Estate*, 86 N. Y. 518.

² *State v. Duket*, 90 Wis. 272, 63 N. W. Rep. 83.

the privilege of contracting marriage. This would be impairing the obligations of a contract, and besides would be a direct blow at the very foundation of our social institutions. The reason is akin to that which denies to the legislature the right to take away from a person the privilege of suing to recover his debt in the courts, though the law-making power may prescribe regulations requiring this to be done within some expressed reasonable time. So, too, such legislative authority may prescribe the modes of contracting matrimony; the ceremony to be observed; the age of the parties at which, in law, they will be permitted to marry; may require the consent of the parents under certain ages, and may impose other like reasonable requirements upon the parties; may prescribe certain civil or ecclesiastical officers before whom the contract must be entered into; fix the laws of descent and prescribe who are and are not bastards; may lay down the duties of parents to their children and of the children to their parents, and, in short, may regulate these contracts with reference to all like and kindred matters.¹ And the legislature may, likewise, pass reasonable laws prescribing the rights of property between married persons, such as dower, curtesy, etc., and may increase or diminish either or abolish both.² But parties to a marriage agreement cannot fix their property rights by mutual consent otherwise than the law provides.³ Of course they may convey their property to each other if permitted by law, but otherwise not.

§ 139. Consent — Necessity of.—As in all contracts there must be a meeting of the minds of the parties to a contract of marriage with the full understanding of the nature and consequences of the undertaking. The mutuality of intention is an essential element, and before any marriage can be valid this must exist.⁴ The consent, too, must be free and voluntary; not

¹ *State v. Walker*, 36 Kan. 297, 13 Pac. Rep. 279.

² *Noel v. Ewing*, 9 Ind. 37.

³ *Clancy v. Clancy*, 66 Mich. 202, 33 N. W. Rep. 889.

⁴ *Clark v. Clark*, 13 Vt. 460; *Mt. Holly v. Andover*, 11 Vt. 226; *McClurg v. Terry*, 21 N. J. Eq. 225; *Clancy v. Clancy*, 66 Mich. 202, 33 N. W. Rep.

809. In this last case the contract at issue was in writing and in the following words: "An article of agreement made and entered by and between Mrs. McC. and C. We mutually and jointly agree from now, henceforth and forever, to live as man and wife, but each party retains the right to buy, sell and transfer

superinduced by any overpowering force, fear or persuasion.¹ And the marriage, of course, where it is celebrated with the consent of only one of the parties, the other expressly withholding consent, will be void, though officiated over by an officer duly authorized to solemnize marriage.² No civil or religious officer can supply the required consent simply by acting in disregard of it. For, were this true, the consent would not be necessary.

§ 140. Marriage in jest — Status of.— It should scarcely be necessary to say that a marriage in jest amounts to nothing. Yet such marriages, or rather pretended marriages, sometimes annoy the courts. A marriage where neither of the parties gives consent thereto; a marriage not meant to be binding by either; the outward forms of which are merely gone through for mirth or fun,—most assuredly amounts to nothing whatever, and can have no binding force or create any obligations of any kind. Such an agreement has no elements of a *bona fide* contract. Neither party expects or intends that it will be fulfilled or carried out, and neither, doubtless, would entertain for a moment the idea of going through the mock ceremony if they had the faintest idea that they would be indissolubly bound thereby.³ Of course a court of equity can pronounce such a marriage null if it be in fact necessary.⁴ But it is not at all necessary that such a decree be sought. It would be but a judicial determination of a fact which asserts itself.

§ 141. Impotency.— As one of the purposes of marriage is the procreation of species, it naturally follows that a person, whether male or female, in order to be marriageable in the

their respective properties, without question of the other party.” Of this contract the court said: “This agreement, when examined and analyzed, will be found to provide only for a concubinage intercourse between the parties. It does not in terms purport to be a marriage agreement, nor an agreement to live together as husband and wife. It also expressly repudiates all property rights arising from such relation. In no view that we have been able to take of this in-

strument can it be regarded as a valid contract of any kind, and no rights can be claimed by either party thereunder.”

¹ Countess of Portsmouth v. Earl of Portsmouth, 1 Hag. Ecc. 355.

² Roszel v. Roszel, 73 Mich. 183, 40 N. W. Rep. 858.

³ McClurg v. Terry, 21 N. J. Eq. 225. See also Summerlin v. Livingston, 15 La. Ann. 519.

⁴ McClurg v. Terry, 21 N. J. Eq. 225.

fullest legal sense, must not be impotent. This disability is generally recognized as a ground of nullity, though, until annulled, a marriage between persons one, or even both, of whom are impotent, is not regarded in law as void, but merely voidable, and is good until annulled.¹ But, ordinarily, the impotence which will authorize the annulment of a marriage because thereof must be incurable.² If necessary to ascertain the fact of impotency, the court will order an examination of the person alleged to be impotent by medical experts.³ But this is a delicate proceeding, not specially favored, and will rarely or never be ordered when it is clear that it could serve little or no useful purpose; as, for instance, where the woman is very old and has long since passed the period when the passions are subdued in the course of nature.⁴ But a man will not be allowed to plead his own impotency in order to avoid his marriage. He is estopped from taking such a stand.⁵ At any rate, a person seeking to annul his own marriage by reason of his impotency must bring his action within a reasonable time after the discovery of the impotence.⁶ It would seem, upon principle, that it would be a very rare case where a man would be permitted to come into court and ask the dissolution of his marriage because of his impotency. But the causes of impotency are not material. Whether it be from natural deformity or deficiency or arise from disease, the rule of law is the same. It is a ground of nullity from whatsoever source it may spring.⁷

§ 142. Impotency — Must exist at time of marriage.— It is not sufficient that the impotency which the law recognizes as a ground for the annulment of marriage exists, simply, but it must exist at the time the marriage is contracted. Further, generally speaking, it must be incurable, for a temporary impotency should not be permitted to dissolve a marriage.⁸

¹Smith v. Morehead, 6 Jones Eq. (N. C.) 300; 1 Bl. Comm. 434; Greenstreet v. Cumyns, 2 Phil. Ecc. 10; State v. Ross, 76 N. C. 242; Hicks v. Skinner, 72 N. C. 1.

²Devanbach v. Devanbach, 5 Paige, Ch. 554; Greenstreet v. Cumyns, 2 Phil. Ecc. 10.

³Greenstreet v. Cumyns, 2 Phil. Ecc. 10; Devenback v. Devenback, 5 Paige, Ch. 554.

⁴Briggs v. Morgan, 8 Phil. Ecc. 325.

⁵Norton v. Norton, 3 Phil. Ecc. 147.

⁶Norton v. Norton, 3 Phil. Ecc. 147; Briggs v. Morgan, 3 Phil. Ecc. 325.

⁷Briggs v. Morgan, 3 Phil. Ecc. 325.

⁸Brown v. Brown, 1 Hag. Ecc. 523. See, too, Payne v. Payne, 46 Minn. 467, 49 N. W. Rep. 230; Anonymous, 89 Ala. 291, 7 S. Rep. 100.

Indeed, it is not every case of incurable impotency that will serve as a ground for the annulment of the marriage. For instance, where the wife, at the time of the marriage, is very old and far past the age at which the change of life takes place in the female. If one marries a woman in this condition, he must be presumed to intend to accept her as she is; he certainly will not be heard to complain of her impotency.¹ But where a man and wife have lived together for twelve years without issue, and the husband refuses to answer a bill for divorce on the ground of impotency, where he has repeatedly admitted this condition to medical experts and refuses to submit to a medical examination, the condition of impotency at the time of marriage has been held to be sufficiently shown.² In many of the states there are statutes providing that where either party at the time of the marriage is permanently and incurably impotent, this will be such a condition as to authorize the annulment of the contract for this reason; and under such a statute, that physical incapacity is synonymous with, at least tantamount to, the term "impotency."³

§ 143. Impotency — Scope of the term.— By the word "impotency," as used in the law books, is meant something more than a mere lack of power of procreation or even the full physical ability of sexual connection. As said by the supreme court of Minnesota in a late case, "it means want of *potentia copulandi*, and not merely incapacity for procreation. And what the law refers to is capacity for *copula vera*, and not partial and imperfect or unnatural copulation."⁴ It naturally follows, therefore, that any physical defect which does not prevent as much as an imperfect copulation would neither be a disability to contract marriage, nor ground for a dissolution thereof afterwards.

¹ Brown v. Brown, 1 Hag. Ecc. 523.

² Pollard v. Wybourn, 1 Hag. Ecc. 725.

³ Anonymous, 89 Ala. 291, 7 S. Rep. 100. In Arkansas it is provided that "where either party, at the time of the contract, was, and still is, impotent," nullity of the marriage may be decreed. S. & H. Dig. Ark., § 2505.

This practically makes impotency, whether incurable at the time of the marriage or not, a ground of nullity if it only exists at the time of the marriage continuously to the time of trial.

⁴ Payne v. Payne, 46 Minn. 467, 49 N. W. Rep. 230. And see Griffith v. Griffith, 53 Ill. App. 474.

§ 144. Impotency — Jurisdiction in such cases.— In New York it has been held that the courts of that state, in the absence of a statute authorizing it, could not decree a dissolution of a marriage for impotency. This was upon the theory that the divorce law of England was that administered in the ecclesiastical courts, and that it was not the common law of that country as brought over to this at its settlement, or adopted by statute, and that consequently, there being no statute of that state expressly conferring jurisdiction upon the courts of equity to pronounce a marriage void because of impotency, there could be no decree of nullity because of this impediment.¹ But this cannot be said to be the general rule. It is inherent in courts of chancery to relieve parties from the performance of a contract the vital purposes of which, because of such an impediment, cannot be carried out. Such cases are closely akin to those of fraud or mistake, where equity is always ready to lend a relieving hand. Such matters are always regarded as within the peculiar and extraordinary jurisdiction of equity courts.

§ 145. Civil effects of marriage — Where void — Louisiana law.— By law in this state, the civil effects which ordinarily follow a valid marriage are given to all marriages where one or both of the parties enter into the same in good faith. This is true though there may be some impediment existing at the time which would, at common law, be ground for nullity of the contract. In fact, the marriage itself is void under the law, regardless of this statutory provision. It is only the civil effects of a valid marriage, such as legitimacy, community of acquests and gains, etc., which remain lawful.²

§ 146. General rule for construction of laws in reference to marriage.— It is the policy of the law to construe all common-law and statutory provisions relating to marriage in a way that, if possible, the relation and the regularity thereof, as well as the legitimacy of the children thereof, will be sustained. The law favors marriage as well as the legitimacy of the issue thereof, and is always slow to uproot them, unless there is no

¹ *Burtis v. Burtis*, 1 Hopk. Ch. 557. La., § 2370; Civil Code La., § 336.

² *Summerlin v. Livingston*, 15 La. art. 63; *Saul v. His Creditors*, 5 Mart. Ann. 510. See also Revised Code (N. S.) 569.

other intelligent and reasonable construction to be put upon the law bearing on the subject. It seeks, by construction, to sustain rather than denounce the relation.¹ An important public policy lies at the foundation of this principle. It is to the interest of the state and to society in general that a marriage be presumed or held to be legitimate when this can be done without violence to any fundamental rules of law or inviolable rights of any citizen. The upholding of the institution tends to promote peace and harmony, to insure legitimacy, and fix property rights, rights of inheritance and other kindred rights.

¹Meyers v. Pope, 110 Mass. 314; Estate, 168 Pa. St. 561, 32 Atl. Rep. 98; Port v. Port, 70 Ill. 484; Dyer v. Smith v. Smith, 52 N. J. Law, 207, 19 Atl. Rep. 255; Bowman v. Bowman, 24 Ill. App. 165; Patterson v. Gaines, 6 How. (U. S.) 550; Nixon v. Cattle Brannock, 10 Ohio St. 391; Dumarsley v. Fishley, 3 A. K. Marsh. (Ky.) 377; Co., 84 Tex. 411, 19 S. W. Rep. 560; Campbell v. Gullatt, 43 Ala. 47; Goodwin v. Thompson, 2 Greene (Iowa), 329; Catteral v. Sweetman, 9 Jur. 951. Ingersoll v. McWillie, 9 Tex. Civ. App. 543, 30 S. W. Rep. 56; In re Strauss'

CHAPTER II.

HUSBAND AND WIFE.

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§ 147. **Introductory remarks.**—Naturally, a treatment of the subject of husband and wife would follow that of marriage. This station in life follows the contract of marriage and is the consummation of that agreement. The parties enter upon new relations, new duties, rights and obligations, both to themselves and to the world at large. They leave off the single existence and enter upon a joint life of blended unity, the head of which is found in the husband according to the teachings of the common law as well as of holy writ. Both cannot be paramount, and it is clear that if the authority of each be the same much friction might follow. The wife might insist on living in one place, the husband in another. Controversies as to the duties of both might arise. And while the husband has no right to impose upon his wife any duty not sanctioned by law, yet he has the right to expect that she will perform these properly; and she has the same right to require of him a due performance of the duties and grave responsibilities which the law exacts at his hands. These are required of the parties for their own mutual good and protection as well as for the general welfare and good of society. And whatever may be the property rights of the husband or wife, either at common law or under statutes changing the same, the strictly marital duties of affection, fidelity, respect, honor, confidence, and all the many other serious and sacred duties flowing from and arising upon the marriage contract, are mutual and reciprocal. The husband cannot lavish his affection and society upon another; neglect to care for or support his wife; refuse to cohabit with her; treat her with disdain, or, ignoring

the marital obligation and honor on his part, require of her, nevertheless, the most rigid observance of her duty towards him. Of course the wife could not so act towards the husband. "Each owes to the other the fullest possible measure of conjugal affection and society,—the husband to the wife all that the wife owes to him."¹

§ 148. Husband's liability for debts of the wife.—Under the common-law rule the husband was liable absolutely, so long as he lived and the relation of coverture existed, for all the debts of the wife contracted before marriage. This was a burden imposed upon him by law in return for the great advantage he received by taking all the property of his wife—the personalty reduced to possession absolutely, and the realty for life—by operation of law upon the consummation of the marriage. The rule stands, in part, upon the principle that it is inequitable to vest the property of the wife in the husband and leave her creditors without a remedy to make their claims. As the husband took what they might have otherwise resorted to in order to realize their debts owing by the wife, it was thought very proper indeed that the husband be required to become responsible for these.² It makes no difference how much or how little the wife owes at the time of her marriage, or how much or little the husband may receive by virtue of the marriage in the way of property. His liability is the same.³ This liability attaches and becomes fixed at once upon the consummation of the marriage. The law fixes it, and there is nothing to be done by either party after the marriage which can take from or add to the liability.⁴ But the extent to which a husband is liable for the ante-nuptial obligations of the wife is only so far as she would have been liable had not the marriage intervened. The debt of the wife does not, by the marriage, become that of the husband. He is only liable for it by force

¹ *Foot v. Card*, 58 Conn. 1, 18 Atl. Rep. 1027; *Lynch v. Knight*, 9 H. L. Cas. 577, 589; *Mayhew v. Mayhew*, 61 Conn. 233, 23 Atl. Rep. 966.

² 1 Bl. Comm. 443; 2 Kent, Comm. 130; *Morrow v. Whitesides*, 10 B. Mon. (Ky.) 411, 412; *Williams v. Rivercomb*, 31 Ark. 292; *Alexander v. Morgan*, 31

Ohio St. 456; *Ferguson v. Williams* (Ark.), 44 S. W. Rep. 1126.

³ *Welden v. Chambers*, Adm'r, 7 Ohio St. 30; *Harrison v. Trader*, 27 Ark. 288, 289.

⁴ *Taylor v. Roundtree*, 13 Lea (Tenn.), 725.

of law so long as the coverture exists. And if the wife could, upon any ground, have successfully defended against the claim before coverture, the husband may just as successfully make the defense after. In other words, if the wife was not liable, for any reason, the husband will not be by reason of the marriage.¹

§ 149. Liability of husband for wife's debts—Effect of agreement between each other.—The liability of the husband for the contracts of the wife made *dum sola*, being fixed and determined by law, it is not within the power of the parties to alter this rule of law in any sense by an agreement or undertaking between themselves as to such liability, whether it be before marriage and in contemplation thereof, or during coverture.² But a post-nuptial agreement between husband and wife whereby property is set apart by the husband to the wife for her sole and separate use and benefit, while void in law, will be upheld in equity, and enforced where it is not to the prejudice of the rights of third parties.³ So if a husband permits his wife to acquire money by her own exertions and personal management, aside from his business or affairs, this will be deemed in equity her property, and if the husband should borrow it from her he will be liable to her therefor in equity, where no injury is done to third parties by holding him so liable.⁴

§ 150. Liability of husband for debts of wife—Death of wife—Effect.—While the husband, at common law, takes his wife with her debts and becomes liable therefor just as she was before coverture, yet the right thus given to sue the husband must be pursued and prosecuted to judgment while the wife is alive. If it is not in such apt time carried into effect, the creditor of the wife is forever barred from afterwards maintaining a suit against the husband.⁵ The reason of this rule is,

¹ Cole v. Shurtleff, 41 Vt. 311.

Wood v. Warden, 20 Ohio St. 518;

² Harrison v. Trader, 27 Ark. 288; Govan v. Moore, 29 Ark. 667, 672; Marshal v. Rutton, 8 T. R. 845; In re The Vale of Neath Brewery Co., 3 De Gex & S. 210; Moore v. Craig, 5 Bos. & Pull. (N. R.) 148.

Garlick v. Strong, 3 Paige Ch. 440; Liles v. Fleming, 1 Dev. Eq. (N. C.) 185, 187; Ex parte Wells, 3 Desaus. (S. C. Eq.) 155, 158; Pinney v. Fellows, 15 Vt. 525, 537.

⁴ Slanning v. Style, 3 P. Wms. 334;

³ Huber v. Huber, 10 Ohio St. 371; Walden v. Walden, 7 Ohio St. 30, 36;

Huber v. Huber, 10 Ohio St. 371, 374.

⁵ Cole v. Shurtleff, 41 Vt. 311; Cure-

the husband only takes the chattels of the wife which were in her possession at some time during the coverture; and the judgment must be against him within the time in which the law vests the property of the wife in him, because the taking of her property is the foundation and reason of the rule of the liability of the husband of her ante-nuptial debts; and as the coverture terminates at the death of the wife, and the husband can take none of her property by virtue of the marriage after her death, the law imposes upon creditors the duty of reducing their claims to judgment against the husband while the wife lives.¹ Nor is a mere action on the liability enough. The suit must be begun and prosecuted to final judgment within this time.² And this is the case though during the existence of the marriage relation the husband may have acknowledged to the creditor of the wife his liability.³

§ 151. Liability of husband for debt of wife — Action on, how brought.— At common law no action lies against a wife on a liability incurred by her *dum sola*. Nor could a suit be maintained thereon against the husband alone, for the liability is really that of the wife, which, during coverture, cannot be enforced against her for this reason. If the husband should die before the wife the action would have to be against her, for the liability of the husband continues only so long as does the coverture, for neither his heirs nor estate is liable upon such an undertaking. And if there should remain any property of the wife which the husband had not reduced to possession during the coverture, this could be reached by her creditors after his death in an action against her. In such cases, as a suit against the husband alone might prejudice the right of the creditor to afterwards sue the wife in the event she should survive the husband, and as the rights of all parties in interest

ton v. Moore, 2 Jones Eq. (N. C.) 204; 2 Kent, Comm. 143; Lamb v. Beldin, 16 Ark. 539; Bickner v. Smith, 4 Des-saus. (S. C. Eq.) 371; Heard v. Stamford, 3 P. Wms. 409; Phaelan v. Per-man, 2 McCord (S. C. Eq.), 423, 430; Morrow v. Whitesides, 10 B. Mon. (Ky.) 411, 412; Witherspoon v. Du-bose, 1 Bai. (S. C. Eq.) 166; Earl of

Thomond v. Earl of Suffolk, 1 P. Wms. 461.

¹ Lamb v. Beldin, 16 Ark. 539; 2 Kent, Comm. 143, 144; Cureton v. Moore, 2 Jones Eq. (N. C.) 204.

² Cureton v. Moore, 2 Jones Eq. (N. C.) 204.

³ Cole v. Shurtleff, 41 Vt. 311.

should be concluded by one action, when practicable, it was held, at common law, that an action for the ante-nuptial debts of the wife should be brought against both the husband and wife as joint defendants.¹ This requirement loses none of its force by reason of the fact that the husband and wife may be living apart at the time of the action by agreement among themselves, she receiving from him a proper allowance for maintenance and support.² The liability is really in the wife. She is regarded as the debtor in fact, though during the disability of coverture she cannot be sued alone. The liability of the husband arises, not by contract, for there is no privity between him and the creditor of the wife, but by operation of law alone, and exists while the coverture lasts, and no longer. When he dies, the liability of the wife, which, during the coverture, has been dormant, as it were, revives and becomes effective. She can then be sued as though she had never been married.³ The fact that the husband, upon the marriage, receives a fortune from his wife does not in any respect change the rule.⁴ Nor does the fact that, in the life-time of the husband, the creditor sued out an attachment and thereby perfected a lien on the property of the husband before he died, but who died before judgment. The right to enforce such a lien must hinge on the right to recover judgment against the defendant. And if anything should transpire before judgment which would cut off this right to a judgment, the right to the lien must fall with it.⁵

§ 152. Liability of husband for debts of wife — Rule under modern statutes.— While the husband is liable under the common law for the debts of his wife, whether contracted in general before marriage or specially afterwards, for necessities and like matters, yet he is not liable under modern statutes authorizing her to own, control and dispose of property as a single person, for any indebtedness she may incur with refer-

¹ *Mitchinson v. Hewson*, 7 T. R. 348; *Eq.*) 166; *Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 461; *Heard v. Cole v. Shurtleff*, 41 Vt. 311, 316.

² *Marshall v. Rutton*, 8 T. R. 545.

³ *Cole v. Shurtleff*, 41 Vt. 311, 316, 2 Kent, Comm. 145.

⁴ *Lamb v. Beldin*, 16 Ark. 539, 540;

Witherspoon v. Dubose, 1 Bai. (S. C.

Stamford, 3 P. Wms. 409; *Phaelan v. Perman*, 2 McCord (S. C. Eq.), 423, 430; *Cureton v. Moore*, 2 Jones (N. C. Eq.), 204.

⁵ *Lamb v. Beldin*, 16 Ark. 539, 540.

ence to her separate estate. As to such indebtedness she alone is liable.¹ This is indeed proper; for it would be inequitable and unjust to make the husband liable for any post-nuptial debts of the wife authorized by law for the benefit of her separate estate, and in no way connected with the necessities and support which by law the husband is properly required to provide for his wife. The separate dealings of the wife are not for his business, and to make him liable for any contracts which the wife might make for her own benefit with reference to her separate estate would improperly and unjustly hamper him in the conduct and management of his own affairs, and further might precipitate his insolvency at any time without notice or warning to either himself or his creditors.

§ 153. Liability of wife for husband's debts.— There is no common liability resting upon the wife for any of the debts of the husband. If any liability can be fixed upon her for this purpose it must be found in statutes expressly or by necessary implication authorizing it. The statutes in this country altering the common law with reference to the ability of the wife to make contracts during coverture usually restrict the power to matters touching, or legitimately connected with, her separate estate. As to these, she is usually authorized to contract, sue and be sued, as a *feme sole*. But this change is an invasion of the old law and will not be enlarged by construction. It is generally held, therefore, that the contract of a married woman, unless made with reference to her separate estate, is not binding upon her.² This being true, a note or other obligation executed by the husband and wife is void as to the wife unless made by her on the faith of her separate estate and with this liability in view.³ In other words, the mere execution of a

¹ Burr v. Swan, 118 Mass. 588; Trieber v. Stover, 30 Ark. 727; Parker v. Pierre, 4 Allen (Mass.), 346; Brasford v. Pearson, 7 Allen (Mass.), 504; March v. Clark, 14 Fed. Rep. 406.

² Collins v. Underwood, 33 Ark. 265; Stowell v. Grider, 48 Ark. 220, 2 S. W. Rep. 786; Jaeckel v. Pease (Idaho), 53 Pac. Rep. 399; Walker v. Jessup, 43 Ark. 163; Post v. Koch, 30 Fed. Rep. 208; Brown v. Prevost, 28 S. C.

123, 5 S. E. Rep. 274; American Mortgage Co. v. Owens, 72 Fed. Rep. 219.

³ Chollar v. Temple, 39 Ark. 238; Jaeckel v. Pease (Idaho), 53 Pac. Rep. 399; Aultman & Taylor Co. v. Rush, 26 S. C. 517, 2 S. E. Rep. 402; Rogers v. Lynch (W. Va.), 29 S. E. Rep. 507; Russell v. Rice (Ky.), 44 S. W. Rep. 110; Smith v. Hardman (Ga.), 27 S. E. Rep. 731; Vankirk v. Skillman, 34 N. J. Law, 109.

note or contract by a married woman with her husband is not a contract in respect to her separate estate.¹ Nor does the execution of a contract by a married woman jointly or otherwise with her husband raise any presumption that by so doing she intends to bind her separate property. This must be affirmatively shown; it will not be presumed, and should not be.² And no judgment can be regularly entered against a married woman whose name appears upon a note or other liability with her husband without the affirmative showing that it was executed by her as a contract incident to her dealings with her separate estate.³ A wife is not liable on the covenants contained in a deed executed by her husband to his land, though she join in the same, unless it is expressly stipulated therein that she is so to be.⁴ At common law, however, all the personal property of the wife became liable for the debts of the husband upon the marriage the same as that he before owned.⁵ Not only was the wife's personalty, which the husband thus took, so liable, but his interest in her realty, which was a right to the uses, rents and profits of all her lands during the continuance of the marriage.⁶

§ 154. Wife's chattels — Husband's rights — Reduction to possession.—The possession of the wife is, in law, that of the husband, generally speaking, and when the marriage is consummated the husband takes, by operation of law, all the personal property of the wife in her possession at the time of the marriage, or which may come to her or his possession at any time during the marriage relation.⁷ It is well settled at common law, therefore, that in order that the husband maintain his dominion and ownership over the chattels and choses in

¹ *Peacock Savings Bank v. Sanborn*, Minn. 408, 51 N. W. Rep. 379; *Security Bank v. Holmes* (Minn.), 71 N. W. Rep. 699.
60 N. H. 558; *Athol Machine Co. v. Fuller*, 107 Mass. 487; *Coats v. McKee*, 26 Ind. 223.

² *State Nat. Bank v. Smith* (Neb.), 75 N. W. Rep. 51; *Grand Island Banking Co. v. Wright* (Neb.), 74 N. W. Rep. 82.
⁵ *Tatum v. Hine*, 15 Ark. 180; *Dyer v. Arnold*, 37 Ark. 17; *Lindsay v. Harrison*, 8 Ark. 302; *Varlton v. Banks*, 7 Ala. 32.

³ *Jaechel v. Pease* (Idaho), 58 Pac. Rep. 899; *Brown v. Will*, 103 Ind. 71, 2 N. E. Rep. 83.
⁶ *Tiller v. McCoy*, 38 Ark. 91.
⁷ *Jones v. Davenport*, 44 N. J. Eq. 33, 13 Atl. Rep. 652; 2 Kent, Comm. 135; *Thorn v. Weatherby*, 50 Ark. 237, 7 S. W. Rep. 33.

⁴ *Sandwich Mfg. Co. v. Zellmer*, 48

action of his wife, both must be reduced to his possession, either actual or constructive, during the life of both the parties and while the marriage status is in effect.¹ Where the husband purchased land or other property with the money or other personal property of his wife which has been reduced to his possession during the existence of the marriage, the title to the property thus purchased, whether it be real or personal, will vest in him as effectively as though he had used means of his own, not those derived through his wife by virtue of the marriage.² And the husband might assign, appropriate to his own use or effectively release any and all debts or choses in action due the wife at the time of or since the marriage, which he had reduced to possession, the same as he could do in case of his own property otherwise acquired.³ Of course, this idea of reduction to possession by the husband and consequent ownership in him must be restricted to the common-law rule. His possession of the property of his wife, however obtained, cannot divest the title and ownership lodged in her by statutes authorizing her to own, control and dispose of her separate property as a *feme sole* might do.⁴ And where the common-law rule in regard to the personal property of the wife is in force at the time of the marriage, but, before the husband reduces the property to his possession, the law-making authority passes an act vesting in the wife all the property owned by her at the time of its passage, the reduction of the property to possession by the husband thereafter will not avail to fix the ownership in him nor to defeat the statutory title thus con-

¹ Turner v. Davis, 1 B. Mon. (Ky.) 151; Morris v. Whitesides, 10 B. Mon. (Ky.) 411; Lamb v. Beldin, 16 Ark. 539; Cole v. Shurtleff, 41 Vt. 311; Heard v. Stanford, 3 P. Wms. 410; Wilson v. Bates, 28 Vt. 765; Garforth v. Bradley, 2 Ves. 676; Barlow v. Bishop, 1 East, 432; Burleigh v. Coffin, 22 N. H. 118; Stewart v. Stewart, 7 Johns. Ch. 229; Udell v. Kenney, 3 Cowen, 590; Cox v. Morrow, 14 Ark. 603; Carter v. Cantrell, 16 Ark. 154; Sorrels v. Trantham, 48 Ark. 386, 395, 4 S. W. Rep. 281; Ferguson v. Moore, 19 Ark. 397; Dyer v. Arnold, 37 Ark. 17; Vaughn v. Parr, 20 Ark. 600,

604; Carpenter v. Hazelrigg (Ky.), 45 S. W. Rep. 666; Eggleston v. Slusher, 50 Neb. 83, 69 N. W. Rep. 310; McClannahan v. Davis, 8 How. (U. S.) 870; Starrett v. Wynn, 17 S. & R. (Pa.) 130.

² Ferguson v. Moore, 19 Ark. 379, 387; Dyer v. Arnold, 37 Ark. 17, 22; Kieth v. Miller, 174 Ill. 64, 51 N. E. Rep. 151.

³ Cassell v. Carroll, 11 Wheat. 134.

⁴ Ago v. Canner, 167 Mass. 390, 45 N. E. Rep. 754; Knight v. Beckwith Commercial Co. (Wyo.), 46 Pac. Rep. 1094.

ferred upon the wife.¹ When the property was reduced to possession by the husband at common law, it descended, at his death, to his heirs, not to the heirs of his wife. His ownership being then absolute, the property would descend just as his other property.²

§ 155. Wife's chattels—Possession in husband—Character of possession required.—In order that the husband's possession of the wife's chattels or choses in action be such as is contemplated by law, it must be in right of the marital relation and by virtue thereof. Possession of any other kind will not vest the ownership in the husband. Where, therefore, a chose in action of the wife which is negotiable by delivery is turned over to the husband, who immediately transfers the possession to his wife, acting merely as the agent by and through whom the note is handed to her, this will not be such a taking of possession as is required.³ Nor is the control of the wife's property by the husband in the capacity of a trustee sufficient; for here he has a trust to administer, and acts in his representative capacity rather than in the assertion of his marital right.⁴

§ 156. Right of husband to property of wife—Rule in case of after-acquired property.—The husband at his marriage takes not only the property actually belonging to his wife at the time, but further, any and all property which the wife may subsequently acquire by her separate exertions as well as by gift, inheritance or otherwise. And this is true whether they live together after marriage or not.⁵ So, if the wife receive a legacy during the coverture, which consists of personal property only, this will at once vest in the husband.⁶ And if the husband should purchase realty with money coming to the

¹ Keagy v. Trout, 85 Vt. 390, 7 S. E. Rep. 329.

² 2 Kent, Comm. 143; Carter v. Cantrell, 16 Ark. 154; Taylor v. Roundtree, 15 Lea (Tenn.), 725, 730, 731; Allen v. McCullough, 2 Heisk. (Tenn.) 174, 182, 183.

³ Barber v. Slade, 80 Vt. 191.

⁴ Walden v. Chambers, 7 Ohio St.

30; Wall v. Tomlinson, 16 Ves. Jr. 412; Baker v. Hall, 12 Ves. Jr. 497; Lucas v. Lucas, 1 Atk. 270.

⁵ Moores v. Carter, Hemp. 64; Refeld v. Belette, 14 Ark. 148; Tatum v. Hines, 15 Ark. 180; Sadler v. Bean, 9 Ark. 202; Brasfield v. Brasfield, 96 Tenn. 580, 36 S. W. Rep. 385.

⁶ Jacks v. Adair, 31 Ark. 16.

wife during coverture, it will belong to him, not to her.¹ And real estate bequeathed to the wife and descending to her during the marriage becomes the husband's for life, with remainder to her after his death, should she survive him, or, in the event he should survive her, the fee would vest in her heirs at his death.²

§ 157. *Gift.*—The husband in his life-time may lawfully give to his wife any property he may wish under the modern statutes permitting dealings between husband and wife. And love and affection, aside from any property or pecuniary consideration, as well as the duty of the husband to provide for his wife, are sufficient to base a gift upon, so long as the effect of the transfer is not prejudicial to the rights of creditors of the husband.³ It is held, too, that it is not necessary that the conveyance be made through the medium of a trustee, but may be direct from the husband to the wife.⁴ But generally, when the gift is directly to the wife from the husband, the rights of the parties are cognizable only in equity, unless the statutory law expressly authorizes conveyances and transactions between husband and wife.⁵ Where the husband, in good faith, makes a gift to his wife upon the consideration of love and affection, it will be valid as to future creditors unless made with the pre-conceived purpose of defeating an obligation of the husband to arise in the future, and the wife has notice, actual or constructive, of this purpose. The fact that he may afterwards become insolvent will not defeat the gift.⁶ And even as to existing creditors such a gift would not be invalid, though the husband may afterwards become insolvent and unable to pay existing creditors, if he was solvent when he made the gift, and his insolvency was brought about by unforeseen events and

¹ *Dyer v. Arnold*, 37 Ark. 17.

² *In re Nelson's Will* (Vt.), 89 Atl. Rep. 750; *Hackett v. Maxley*, 68 Vt. 210, 34 Atl. Rep. 949.

³ *Horder v. Horder*, 23 Kan. 391, 392; *State v. Wallace*, 67 Iowa, 77, 24 N. W. Rep. 609; *Tootle v. Caldwell*, 30 Kan. 125, 1 Pac. Rep. 329; *Thompson v. Allen*, 103 Pa. St. 44, 48; *First Nat. Bank v. Havlik* (Neb.), 71 N. W. Rep. 291; *Williams v. Hoehle*, 95 Wis. 510,

70 N. W. Rep. 556; *Reamey v. Bailey* (Pa.), 11 Atl. Rep. 438; *Hunt v. Johnson*, 44 N. Y. 27; *Jones v. Clifton*, 101 U. S. 225; *Wells v. Treadwell*, 28 Miss. 717; *Maddox v. Summerlin* (Tex. Civ. App.), 47 S. W. Rep. 1020.

⁴ *Reagle v. Reagle*, 179 Pa. St. 89, 36 Atl. Rep. 191.

⁵ *Neves v. Scott*, 9 How. (U. S.) 196.

⁶ *Stewart v. Platt*, 101 U. S. 731.

was not contemplated when the same was effected.¹ So a gift made by a husband to his wife of his earnings, whether it be by the payment of money received by him for his work or is invested in property in her name, or is applied to the payment of her debts, provided the earnings thus applied do not amount to more than the exemptions allowed the husband by law.² Where a gift is made in compliance with law, the title and ownership of the thing given at once vests effectively in the donee, and the donor loses all control and dominion over the gift thereafter. And where the husband gives property of any kind to his wife, she may, where she is authorized to sue alone with reference to her separate property, maintain an action against a wrongdoer for a conversion thereof or an injury thereto.³ But the husband cannot effect a valid gift of lands to his wife unless he make the grant in writing as required by the statute of frauds, or unless he surrenders possession and dominion in pursuance of the gift.⁴ Where the law of community property is in force, the husband may make a gift of his interest in such property to his wife. This may be effected by a purchase of property with community funds, the title being taken in the name of the wife with the intention, on the part of the husband, of vesting the same in her, she, of course, consenting.⁵

§ 158. Gift to wife — Executed trust — Rights of husband. Where a gift is made to a married woman during coverture through the medium of a trustee, the use of the thing given vests at once in the wife, and by operation of law in the husband by virtue of his marital rights, where there is nothing for the trustee to do in order to make the gift complete. In such cases the trustee is, in legal effect, merely a fictitious person, the equitable and legal title vesting, *eo instanti*, in the *cestui que trust*, and through her in her husband.⁶ So where an estate is granted to A. for life, and to his heirs at his death, this would

¹ Smith v. Yell, 8 Ark. 470.

⁵ Wright v. Wright (Cal.), 41 Pac.

² Robb v. Brewer, 60 Iowa, 539, 15 N. W. Rep. 420.

Rep. 695.

³ Cummings v. Friedman, 65 Wis. 183, 26 N. W. Rep. 575.

⁶ Maulding v. Scott, 13 Ark. 88; Roane v. Rives, 15 Ark. 328, 330; Lindsay v. Harrison, 8 Ark. 302; Sadler v.

⁴ Huffman v. Huffman, 118 Pa. St. 58, 12 Atl. Rep. 308.

Bean, 9 Ark. 202.

carry the whole estate under the rule in *Shelley's Case*.¹ And when this is true, the husband takes his marital estate, holding the property, if real estate, during the existence of the marriage, in right of his wife, with right to the rents and uses thereof during the coverture, and the personal property absolutely.² If the husband deposits money in bank to the credit of his wife and subject to her check, this will amount to a gift of the funds thus deposited.³ And where a husband turns over money to his wife without making any directions as to its disposition, the presumption will be it was intended as a gift.⁴ This rule is, of course, under statutes authorizing married women to own and control personalty in their own right, as a gift of personalty could not be made by the husband to the wife at common law.⁵ But a husband may permit his wife to appropriate her personal property owned at the time of her marriage, together with her earnings since, to her own separate use. And by so doing he loses control and authority over the same.⁶

§ 159. Property purchased in name of wife — Gift — Presumption.—Where the husband buys property and takes title in the name of his wife instead of his own, the presumption is he intends it as a gift for his wife, where the money paid therefor is his. In such cases it will not be necessary to adduce affirmative proof to establish the fact of a gift.⁷ In fact, it is held that this presumption can only be rebutted by clear and convincing evidence, the burden of producing which rests upon the party seeking to defeat the same.⁸ But where the law of

¹ *Kleppner v. Lafferty*, 70 Pa. St. 72; *Moody v. Walker*, 3 Ark. 148, 188; *Hardage v. Stroope*, 58 Ark. 303, 307, 24 S. W. Rep. 490; *Van Olinda v. Carpenter*, 127 Ill. 42, 19 N. E. Rep. 868; 4 Kent, Comm. 215; *Starnes v. Hill*, 112 N. C. 1, 16 S. E. Rep. 1011; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. Rep. 814; *Wicker v. Ray*, 118 Ill. 472, 8 N. E. Rep. 835; *Ryan v. Allen*, 120 Ill. 648, 12 N. E. Rep. 65.

² *Maulding v. Scott*, 13 Ark. 88; *Denson v. Thompson*, 19 Ark. 66.

³ *Hairston v. Glenn*, 120 N. C. 341, 27 S. E. Rep. 32; *Baker v. Hedrich*, 85 Md. 645, 37 Atl. Rep. 363.

⁴ *Burt v. Jones*, 45 Mich. 392, 8 N. W. Rep. 93.

⁵ *Dayton Spice Mills Co. v. Sloan*, 49 Neb. 622, 68 N. W. Rep. 1040.

⁶ *Jackson v. Jackson*, 91 U. S. 122.

⁷ *Higgins v. Johnson's Heirs*, 20 Tex. 389; *Dunham v. Chatham*, 21 Tex. 231; *Smith v. Boquet*, 27 Tex. 507; *Caffey's Ex'rs v. Cooksey* (Tex. Civ. App.), 47 S. W. Rep. 65; *Koborg v. Greder* (Neb.), 70 N. W. Rep. 921; *Leslie v. Leslie*, 53 N. J. Eq. 275, 31 Atl. Rep. 170.

⁸ *Whitley v. Ogle*, 47 N. J. Eq. 67, 20 Atl. Rep. 284.

community property is in force, it is held that the fact alone that a husband buys property and takes the deed thereto in the name of his wife does not imply a gift to the wife so as to divest or defeat the community character of the estate thus acquired.¹

§ 160. Advancement — General rule.— Where the husband buys property with his own funds, and the title, at his request, is made to his wife instead of to himself, this will be deemed in law, where nothing to the contrary is made to appear, to be intended as an advancement. The ownership of the property thus conveyed indirectly to the wife by him will vest in her.² Whether or not a provision be made by a husband out of his property to his wife must depend upon his intention in making the transfer from all the surrounding facts and circumstances.³ But the presumption is, when a husband buys property, the title to which he takes in her name instead of his own, that he intends it as an advancement to his wife.⁴ But this presumption may be rebutted by competent affirmative proof of a different intention.⁵ The rebuttal may be effected by parol proof, and it is not necessary that the evidence be in writing, though it may have been necessary that the transaction resulting in the advancement be, in order to meet the requirements of the statute of frauds.⁶

§ 161. Ante-nuptial marriage settlement.— An ante-nuptial marriage settlement is a contract or agreement between the husband and wife before marriage whereby they settle, among themselves and by contract, their respective property rights arising therefrom. These agreements tend more or less to insure domestic peace and tranquillity by assuring to each party his respective rights in all property and advising them at all times just what each is and will be entitled to. This

¹ Caffey's Ex'rs v. Cooksey (Tex. Civ. App.), 47 S. W. Rep. 65.

² Warren v. Brown, 25 Miss. 66; Schmalhors v. Peebles, 71 Mo. App. 219; Kinealy v. Macklin, 89 Mo. 433, 14 S. W. Rep. 507; Gray v. Gray, 13 Neb. 453, 14 N. W. Rep. 490; Gilliland v. Gilliland, 96 Mo. 522, 10 S. W. Rep. 139.

³ Walston v. Smith (Vt.), 39 Atl. Rep. 252.

⁴ Livingston v. Livingston, 2 Johns. Ch. 537.

⁵ Livingston v. Livingston, 2 Johns. Ch. 537.

⁶ Livingston v. Livingston, 2 Johns. Ch. 537.

being true, such settlements are favored by the courts, and will generally be construed liberally to effect the end in view.¹ And when these settlements are made without any fraud, concealment or unfairness, they are readily upheld by the courts as concluding the property rights of the parties according to the terms, stipulations and requirements of the agreement.² And it is necessary, in order to successfully attack an ante-nuptial settlement for fraud, to show that both parties are guilty of fraud to the prejudice of the person asserting the bad faith.³ There must always, of course, be a consideration of some kind to support any contract. But a property consideration, according to the best-considered authorities, as well as reason and common sense, is not always necessary. The marriage itself, in the absence of fraud, imposition or concealment, is usually deemed a sufficient consideration for a contract or settlement of this kind, and very properly so.⁴ But of course marriage is not the only consideration that will support a settlement. For instance, the renunciation of dower right in the lands of the husband by the wife is a good consideration for a settlement upon her of a portion of the husband's estate,⁵ or any good and sufficient consideration that would uphold other contracts in general, will be sufficient to sustain a marriage settlement, especially one made before marriage and in contemplation thereof.

§ 162. Marriage settlement — Conflict of laws.—The law governing the validity of marriage settlements is generally that

¹ *Buffington v. Buffington* (Ind.), 51 N. E. Rep. 328; *Matney v. Linn* (Kan.), 54 Pac. Rep. 668. See *English v. Foxall*, 2 Pet. 595.

² *McNutt v. McNutt*, 116 Ind. 545, 19 N. E. Rep. 115; *Shaffer v. Matthews*, 77 Ind. 83; *Barth v. Lines*, 118 Ill. 374, 7 N. E. Rep. 679; *Kennedy v. Kennedy* (Ind.), 50 N. E. Rep. 756; *McGee v. McGee*, 91 Ill. 548; *Andrews v. Andrews*, 8 Conn. 79; *Charles v. Charles*, 8 Gratt. (Va.) 486; *Moore v. Page*, 111 U. S. 117, 4 Sup. Ct. Rep. 388; *Oswalt v. Moore*, 19 Ark. 260; *Dobbins v. Oswalt*, 20 Ark. 619; *Barnes v. Irwin*, 2 Dall. 199; *Cole v. American Baptist Home Mission Soc.*, 64 N. H. 445, 14 Atl. Rep. 73.

³ *Magniac v. Thompson*, 7 Pet. 348.

⁴ *Magniac v. Thompson*, 7 Pet. 348;

Connor v. Stanley, 65 Cal. 183, 8 Pac. Rep. 668; *Pierce v. Harrington*, 58 Vt. 649, 4 Atl. Rep. 462; *Prewitt v. Wilson*, 103 U. S. 22; *McNutt v. McNutt*, 116 Ind. 545, 7 N. E. Rep. 115; *Campion v. Cotton*, 17 Ves. 264; *Jones' Appeal*, 62 Pa. St. 324; *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. Rep. 41; *Ogden v. McHugh*, 167 Mass. 276, 45 N. E. Rep. 731.

⁵ *Hershy v. Latham*, 46 Ark. 542.

in force where the settlement is effected. This is generally the rule, unless it be made to be carried out under other laws, or the parties stipulate that its validity must be controlled by the laws of some other place. When the property rights of the parties are once fixed by settlement, these rights attend them into whatsoever jurisdiction they may go. They do not change upon a removal to another state or country.¹

§ 163. Marriage settlement — Statute of frauds.— Whenever a marriage settlement, whether post-nuptial or ante-nuptial, is required by the statute of frauds to be in writing, it must be thus evidenced, else it will have no binding force.²

§ 164. Marriage settlement — Void when fraudulent.— Whenever either party to a marriage settlement has overreached the other in the consummation thereof, the law will be found ready to afford the party imposed upon a remedy. Neither has the right to make use of a marriage settlement for the purpose of cheating or defrauding the other. When, therefore, it is made to appear that there has been fraud or unfairness on the part of either party to the settlement, whether the settlement be made before or after marriage, whereby one has been injured, the aggrieved one may come into equity and have the contract annulled for this cause.³

§ 165. Marriage settlement — Validity with reference to third parties.— Generally, a marriage settlement whereby a material part of the property of the husband or wife is taken away from the reach of creditors will be void as to them.⁴ But the mere fact that one of the parties may be in debt at the time the settlement is made will not, of itself, affect its binding force. So long as the party making the settlement and transfer leaves enough for his or her creditors, they have nothing of

¹ *Bank of the United States v. Lee*, 13 Pet. 107; *Delane v. Moore*, 14 How. (U. S.) 253.

² *Brown v. Weld*, 5 Kan. App. 341, 48 Pac. Rep. 456; *De Bardeleben v. Stoudenmire*, 82 Ala. 574, 2 S. Rep. 488.

³ *Nathan v. Nathan*, 166 Mass. 294, 44 N. E. Rep. 221.

⁴ *United States Trust Co. v. Sedgwick*, 97 U. S. 304; *Phipps v. Sedgwick*, 95 U. S. 3; *Parish v. Murphree*, 13 How. (U. S.) 92.

which they can complain, for they are not then injured.¹ Nor will an ante-nuptial settlement be void as to creditors when based on the consideration of marriage alone, where the grantee had no notice of any fraudulent design or purpose, and did not participate in or sanction any. In other words, both parties to the transaction must be guilty of fraud before it can be overturned, even though one is in debt at the time of making same.² So a conveyance of property by a husband to his wife, in pursuance of an ante-nuptial settlement, is not void even as to existing creditors, where the wife knew of no fraud or fraudulent intent.³ And fraud in a marriage settlement will not be presumed any more than in any other transaction. It must be established by clear affirmative proof.⁴

§ 166. Post-nuptial marriage settlements — Definition.— A post-nuptial marriage settlement is a transfer, after marriage, by the husband to the wife of property in consideration of marriage. It is in the nature of a gift, and as to creditors and strangers the legal status of a transaction of this kind is governed by the same principles which govern the rights of parties in the case of a gift. So, if a husband, after marriage, convey or give to his wife, as a marriage settlement, any property of whatsoever nature, the conveyance of which, in any other way, would be a fraud upon the creditors of the husband, it will be likewise fraudulent when transferred as a marriage settlement.⁵ And while post-nuptial settlements are usually made by the husband, there is no good reason why the wife may not make such a settlement upon her husband under modern statutes empowering a wife to contract, own and dispose of property as a single person. And in making such post-nuptial settlement the wife should be bound by the same restrictions as to fraud and the rights of her separate creditors that the husband in making a settlement of this kind is required to respect. Indeed, such a settlement is very much in

¹ Lloyd v. Fulton, 91 U. S. 479; ³ Nance v. Nance, 84 Ala. 375, 4 S. United States Trust Co. v. Sedgwick, Rep. 699.

97 U. S. 304.

⁴ Noble v. Davies (Va.), 4 S. E. Rep.

² Prewitt v. Wilson, 103 U. S. 22; 206.

Pierce v. Harrington, 58 Vt. 649, 7
Atl. Rep. 463; Noble v. Davies (Va.), 4

⁵ Keagy v. Trout, 85 Va. 390, 7 S. E.
Rep. 320.

S. E. Rep. 206.

the nature of a gift between the parties, and should be governed largely as gifts are governed.

§ 167. **Post-nuptial settlement — Validity.**—A husband may legally settle property upon his wife after as well as before marriage, when the law permits contracts between husband and wife. Such a settlement is in effect a payment of an obligation to the wife — a thing perfectly legitimate when grounded in good faith.¹ And even though the husband and wife are forbidden to contract with each other at law, yet when these agreements are fair, reasonable, and executed in good faith, they will be sustained in equity.² And the husband may even settle property upon his wife when he is in debt, provided he still leaves enough to pay all his creditors, for such a transaction could not be fairly termed a fraud upon their rights.³ It is not always necessary that insolvency exist, however, but the settlement will be vulnerable to an attack for fraud if it necessarily hinders or delays creditors of the husband in the collection of their claims.⁴

§ 168. **Post-nuptial settlement—Presumption as to fraud.** As a conveyance of property by a husband to his wife when he is insolvent is presumed to be fraudulent as to creditors and others similarly interested, so is a post-nuptial marriage settlement likewise presumed. The burden of overthrowing this presumption is on the wife or heirs, as the case may be, to show that she gave a fair and *bona fide* consideration for the property, which, when done, will entitle her to prevail over creditors and others having no fixed lien or vested right in the property thus settled by the husband on her.⁵ So, a post-nuptial settlement by the husband when he is in debt, and the effect of which necessarily is to withdraw his property or a material part of it from the reach of his creditors, will be void as to them,

¹ Kesner v. Trigg, 98 U. S. 50; Kehr v. Smith, 20 Wall. 31.

² Kesner v. Trigg, 98 U. S. 50.

³ Doc v. Routledge, Cowp. 705; Verplank v. Sterry, 12 Johns. 536; Lush v. Wilkinson, 5 Ves. 384, 387; Kidney v. Cousmaker, 12 Ves. 136, 155.

⁴ Parish v. Murphree, 13 How. (U. S.) 22.

⁵ Blow v. Maynard, 2 Leigh (Va.), 30; Fink v. Denny, 75 Va. 663; Hatcher v. Crews, 78 Va. 460; Rixey's Adm'r v. Detrick, 85 Va. 42, 6 S. E. Rep. 615; Perry v. Ruby, 81 Va. 317; Keagy v. Trout, 89 Va. 390, 7 S. E. Rep. 329.

unless based upon a *bona fide* and valuable consideration.¹ In short, a post-nuptial settlement, being a property arrangement between husband and wife, is presumed to be voluntary, as to creditors of the husband; and the burden of showing that it is *bona fide* and supported by a sufficient consideration is upon those claiming thereunder.² But such a settlement is by no means conclusively fraudulent, even as to existing creditors, and the wife, or those claiming through her, may rebut this presumption by affirmative evidence showing good faith.³ The mere answer of the party claiming by virtue of the settlement denying any fraud in the transaction will not suffice to rebut or overcome the presumption.⁴ In any event, however, this presumption exists as to present creditors only. The transfer would not be void as to future creditors unless it was made with the purpose or intention of defeating their claims;⁵ and when the conveyance is made in pursuance of an ante-nuptial agreement on the part of the husband to settle property upon his wife, the transaction being *bona fide* will be valid in equity.

§ 169. Administration—Right of in survivor.—Under the English ecclesiastical law the husband or wife, as the case might be, was, by virtue of his or her relation to the other, entitled, as of course, to the administration of the estate of the other. The survivor was, in a sense, the legal successor to the other.⁶ And, following the old English idea, this rule has been adopted in some of the American jurisdictions.⁷ But generally the husband has no right as matter of course, in the absence of statute, to administer upon the effects of his deceased wife, where he has before marriage relinquished, in due form of law, all his right and interest in her property.⁸ But there is

¹ Flynn v. Jackson, 93 Va. 341, 25 S. E. Rep. 1; Beecher v. Wilson, 84 Va. 813, 6 S. E. Rep. 209; Witz v. Osburn, 83 Va. 227, 21 S. E. Rep. 33.

² Massey v. Yancey, 90 Va. 626, 19 S. E. Rep. 184; Seitz v. Mitchell, 94 U. S. 580.

³ Lloyd v. Fulton, 91 U. S. 479.

⁴ Fink v. Denny, 75 Va. 663; Hatcher v. Crews, 78 Va. 460; Perry v. Ruby, 81 Va. 317.

⁵ Smith v. Vodges, 92 U. S. 183; Sexton v. Wheaton, 8 Wheat. 229.

⁶ Elliott v. Gurr, 2 Philm. 10; 2 Bl. Comm. 435; Browning v. Reane, 2 Philm. 69; Ryan v. Ryan, 2 Philm. 332; 2 Kent, Comm. 135.

⁷ Parker's Appeal, 44 Pa. St. 309; Whitaker v. Whitaker, 6 Johns. 112, 118; Stewart v. Stewart, 7 Johns. Ch. 229; Clark v. Clark, 6 Watts & S. (Pa.) 85; Price v. Price, 124 N. Y. 589, 27 N. E. Rep. 583.

⁸ Charles v. Charles, 8 Gratt. (Va.) 486.

not so much reason for this practice in the American states at this day, as by modern laws in this country the property of the wife does not go to the husband. He has no general right of possession of it except at her sufferance, and, the reason of the old practice having ceased, the matter of administration on the estate of the wife is usually delegated to the sound discretion of the courts of probate, or those tribunals exercising such jurisdiction, by statutory regulations.

§ 170. Unity of the relation.—By the ancient common law, which holds good to this day where it has been put in force by statute or otherwise, the oneness of the relation of husband and wife was regarded in the strictest sense. By the marriage the parties became “one flesh,” and the entity of the woman, so long as the marriage existed, was lost in, and blended with, that of her husband.¹ But this idea of a rigid unity is a legal, rather than an equitable, fiction; for in equity, husband and wife for many purposes are treated as different persons when it is necessary to so treat them in order to carry out the ends and purposes of equity in doing complete justice. In equity, therefore, the rights, duties and liabilities of husband and wife are enforced very much like rights and liabilities of strangers.²

§ 171. Unity of the relation—Rule of the civil law.—While at common law the husband and wife were considered one for practically all purposes, yet the civil law was more liberal and recognized them as separate and distinct persons for many purposes. By the civil law they might have separate estates, separate causes of action for an injury to the property or person of either, and, generally, separate civil rights in the courts. When any of these rights existed in the wife exclusively, she might maintain an action therefor in her own name

¹ Co. Litt. 112; 2 Kent, Comm. 129; 6 Neb. 260; Hoker v. Boggs, 63 Ill. 161; Trader v. Lowe, 45 Md. 1; O’Ferrall v. Simplot, 4 Iowa, 381, 389; Winebriner v. Weisiger, 3 B. Mon. (Ky.) 32; Snyder v. People, 26 Mich. 106; Barrow v. Barrow et al., 24 Vt. 375, 398; Wells v. Caywood, 3 Colo. 487, 491; Frizzell v. Rozier, 19 Mo. 448; Aultman, Taylor & Co. v. Obermeyer, 25 N. Y. 328; Shepard v. Shepard, 7 Johns. Ch. 57; Stickney v. Boorman, 2 Pa. St. 67; Story, Eq. Jur., sec. 1367; 25 N. Y. 328; Shepard v. Shepard, 7 Johns. Ch. 57; Stickney v. Boorman, 2 Pa. St. 67; Story, Eq. Jur., sec. 1367; Barrow v. Barrow et al., 24 Vt. 375, 398; Wells v. Caywood, 3 Colo. 487, 491; Frizzell v. Rozier, 19 Mo. 448; Aultman, Taylor & Co. v. Obermeyer, 6 Neb. 260; Hoker v. Boggs, 63 Ill. 161; Trader v. Lowe, 45 Md. 1; O’Ferrall v. Simplot, 4 Iowa, 381, 389; Winebriner v. Weisiger, 3 B. Mon. (Ky.) 32; Snyder v. People, 26 Mich. 106; Sadler v. Bean, 9 Ark. 202; Harrison v. Harrison, 20 Ala. 629.
² Sackman v. Sackman (Mo.), 45 S. W. Rep. 264.

without joining her husband. And, on the other hand, in an action where, by reason of this rule, she would be separately and personally liable, she might be sued singly and alone.¹

§ 172. Right of husband to custody of his wife.— By the contract of marriage the parties place themselves in a different station or status in the social world. It is then the duty of the wife to go with her husband. They then owe to the outside world, and to themselves as well, certain duties and responsibilities by reason of the contract, and the rights, privileges and requirements flowing therefrom. Each is entitled to enjoy the society of the other; and the husband, being the head of the family in law, has the right to the unmolested possession and control of the person of his wife to the exclusion of all the world. His home is her home; his domicile her domicile. This being true, it follows that the right of the husband to the custody of his wife's person is paramount to that of parents, guardians and others who, but for the existence of the marriage, would have the exclusive right to such custody of the person. This is true as to parents, though their infant marries before reaching the age of consent laid down by law, so long as the marriage is undissolved.² But if the marriage of such an infant should be dissolved, the right of the parents to the custody of the child would revive at once upon the dissolution and then become paramount to that of the husband.

§ 173. Homestead — Conveyance — Failure of wife to join in — Validity.— In a number of the states there are statutes which provide that the wife must join in a conveyance of a statutory homestead, and these statutes generally require also that she acknowledge the same in the manner laid down by law, and that a failure to do so will render the conveyance absolutely void, not only as to her interest in the subject of the conveyance, but as to the interest or title of the husband as well. Such a law is held to be constitutional.³ And, following the plain language of the statutes, the courts generally hold that a conveyance of a homestead by the husband alone, or

¹ 1 Bl. Comm. 444; Story, Eq. Jur. (Iowa), 329, 335; Gibbs v. Brown, 68 sec. 1367; Sackman v. Sackman (Mo.), Ga. 803.

45 S. W. Rep. 264.

² Bonorden v. Kriz, 13 Neb. 121, 12

³ Goodwin v. Thompson, 2 Greene N. W. Rep. 831.

where the wife does not join therein as the statute directs, is utterly void and of no force whatever for any purpose.¹ The subsequent abandonment by the husband of the homestead, or the subsequent acquisition of a new one, cannot serve the purpose of making valid a conveyance void because, when made, the subject thereof was a homestead and the wife did not join in the deed. Being a nullity there is nothing to validate. And this is true though the effect of the abandonment necessarily extinguished the former homestead right.² In Iowa it is necessary for the wife to join in order that any part or interest in the homestead may pass by the conveyance, though by the local statute she has a fixed and permanent estate in the homestead and is in a sense a joint tenant with her husband.³ When the husband and wife properly join in a conveyance of the homestead in trust to secure an indebtedness, this will be valid so far as the purposes for which the conveyance is made is concerned. But a payment of the indebtedness will extinguish the lien so that the husband cannot thereafter, alone, revive it by contracting other indebtedness upon the faith of the defunct conveyance.⁴ And where the homestead has been conveyed properly to secure an usurious loan, this fact may be pleaded by the wife in defense of her homestead right, though the husband may have estopped himself to set up the usury on his

¹ Hall v. Loomis, 68 Mich. 709, 30 N. W. Rep. 374; Gray v. Schofield (Ill.), 51 N. E. Rep. 684; Coughlin v. Coughlin, 26 Kan. 116; Schermerhorn v. Mahaffie, 34 Kan. 108, 8 Pac. Rep. 199; Shattuck v. Lyons, 62 Ark. 338, 35 S. W. Rep. 436; Shattuck v. Byford, 62 Ark. 431, 35 S. W. Rep. 1107; Chambers v. Cox, 23 Kan. 393; Moses v. McClain, 82 Ala. 270, 2 S. Rep. 741; Gleason v. Spray, 81 Cal. 220, 22 Pac. Rep. 551; Thompson v. Sheppard, 85 Ala. 611, 15 S. Rep. 334; Jenkins v. Simmons, 37 Kan. 496, 15 Pac. Rep. 522; Myrick v. Bill, 5 Dak. 167, 37 N. W. Rep. 369; Conway v. Elgin, 38 Minn. 469, 38 N. W. Rep. 370; Gober v. Smith (Tex. Civ. App.), 36 S. W. Rep. 910; Havemeyer v. Dahn, 48 Neb. 536, 67 N. W. Rep. 489; Horback

v. Tyrrell, 48 Neb. 514, 67 N. W. Rep. 485; Lessell v. Goodman, 97 Iowa, 681, 66 N. W. Rep. 917; Powell v. Patison, 100 Cal. 236, 34 Pac. Rep. 676; Coles v. York, 28 Minn. 464, 10 N. W. Rep. 775; Bonorden v. Kriz, 13 Neb. 121, 12 N. W. Rep. 831; Aultman & Taylor Co. v. Jenkins, 19 Neb. 209, 27 N. W. Rep. 117; Graves v. Baker, 68 Cal. 133, 8 Pac. Rep. 691; Brimer v. Bateman, 66 Iowa, 488, 24 N. W. Rep. 9; Goodrich v. Brown (Iowa), 13 N. W. Rep. 409; Kitterlin v. Milwaukee Mechanics' Mut. Ins. Co., 134 Ill. 647, 25 N. E. Rep. 772; Paxton v. Marshal, 18 Fed. Rep. 361.

² Gray v. Schofield (Ill.), 51 N. E. Rep. 684.

³ Adams v. Beale, 19 Iowa, 61, 67.

⁴ Spencer v. Fredendall, 15 Wis. 666.

part.¹ But it is not necessary, in order to make an effective conveyance of the homestead, where the husband and wife execute the same as required by law, to state therein that the property transferred is the homestead or to otherwise allude to this fact. The mere declaration in the deed does not fix the character of the land, though this might, in some cases, operate as an estoppel.² The validity of these conveyances usually has reference to the time when the conveyance is executed. If the property is not the homestead at the time of the conveyance, but is afterwards impressed with that character by the husband, it will be valid, though not executed in conformity to law in cases where the homestead is involved. And this is true though the property becomes the homestead before foreclosure of the deed of trust, where the property has been mortgaged instead of deeded.³

If the conveyance is void because of the failure of the wife to join with the husband and acknowledge same, this will be cured by a subsequent act of the legislature curing defective acknowledgments where the acknowledgment was the only cause of the invalidity.⁴ And when the defective acknowledgment is thus cured by legislation, the validity of the conveyance relates back to the time of execution.⁵ But this is only to the extent that the intervening rights of third parties which might thereby be prejudiced are not affected.⁶ Otherwise a vested right would be infringed—a thing no state legislature can impair or destroy. Sometimes the statutes require that the wife not only join in the deed or conveyance, but that she also acknowledge it. When this is required, the fact that she may properly join in the execution will not lend validity to the instrument where she fails to acknowledge it as required.⁷ When the statute requires that both husband and wife concur in and sign the conveyance as a condition precedent to validity, a con-

¹ *Campbell v. Babcock*, 27 Wis. 512; *Barber v. Babel*, 36 Cal. 11.

² *Weigeman v. Marsot*, 13 Mo. App. 576.

³ *Heatherly v. Little* (Tex. Civ. App.), 40 S. W. Rep. 445.

⁴ *Hill v. Yarbrough*, 62 Ark. 320, 35 S. W. Rep. 433; *British & American Mortgage Co. v. Winchell*, 62 Ark. 160, 34 S. W. Rep. 891.

⁵ *Hill v. Yarbrough*, 62 Ark. 320, 35 S. W. Rep. 433.

⁶ *Shattuck v. Byford*, 62 Ark. 431, 35 S. W. Rep. 1107.

⁷ *Smith v. Pearce*, 85 Ala. 264, 4 S. Rep. 616; *Shattuck v. Byford*, 62 Ark. 431, 35 S. W. Rep. 1107; *Pipkin v. Williams*, 57 Ark. 242, 21 S. W. Rep. 433; *Bank of Harrison v. Gibson*, 60 Ark. 269, 30 S. W. Rep. 39.

veyance by the husband alone will have no force.¹ If the husband, by reason of a divorce or otherwise, should cease to have a right to dominate the homestead of his wife, he may then convey any land he may have without his wife joining.² Of course an attempt to renounce the homestead right by a separate deed executed by the wife for this purpose can have no effect.³ So, purchase-money notes executed to the husband for a homestead, where the wife does not join, cannot be enforced, for nothing passes by the conveyance and there is no consideration to uphold the promise to pay.⁴ If the conveyance include other lands than the homestead, it will be good as to all the land except the homestead, though as to this the requirements of law are not complied with.⁵ The conveyance will be void though in pursuance of a prior agreement between the husband and grantee made before the marriage, where the land is impressed with the character of homestead before the transfer.⁶ This being true, specific performance could not be compelled at the hands of the husband if the wife were unwilling to join in the deed.⁷ As soon as the wife dies, however, the husband may convey any interest he may have in the homestead, and this is true though the minor children of the marriage have the right by local statute to occupy the homestead during infancy.⁸ If the husband and wife both join in a deed of trust containing a power of sale, and acknowledge the same as required, a sale under the power therein, or by foreclosure proceedings, will vest in the purchaser a good title.⁹ And when a deed of trust in which the homestead land was inadvertently omitted is reformed in equity according to the intention of the parties, a

¹ *Larson v. Reynolds*, 18 Iowa, 597; *N. W. Rep.* 254. And see *Bothell v. Alley v. Bay*, 7 Iowa, 509; *Yost v. Sweet* (N. H.), 6 Atl. Rep. 646.
² *Devault*, 5 Iowa, 60; *Williams v. Tolman v. Leathers*, 2 Fed. Rep. 653.
³ *Swetland*, 10 Iowa, 51; *Revalk v. Kraemer*, 8 Cal. 66.

⁴ *Revalk v. Kraemer*, 8 Cal. 66.

⁵ *Larson v. Butts*, 22 Neb. 370, 35 N. W. Rep. 190; *Howell v. McCrie*, 36 Kan. 636, 14 Pac. Rep. 257; *Dorsey v. McFarland*, 7 Cal. 342; *Poole v. Gerrard*, 6 Cal. 71.

⁶ *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. Rep. 817; *Thimes v. Stumpff*, 33 Kan. 53, 5 Pac. Rep. 431.

⁷ *Swift v. Dewey*, 20 Neb. 107, 29

⁷ *Bird v. Logan*, 35 Kan. 228, 10 Pac. Rep. 564.

⁸ *Holbrook v. Wightman*, 31 Minn. 168, 17 N. W. Rep. 280; *Harmon v. Sommer*, 10 Fed. Rep. 601; *Nebraska Loan & Trust Co. v. Smassall*, 38 Neb. 516, 57 N. W. Rep. 167; *Kiolbassa v. Raley*, 1 Tex. Civ. App. 155, 23 S. W. Rep. 258.

⁹ *Honaker v. Cecil*, 84 Ky. 202, 1 S. W. Rep. 392.

sale thereunder after reformation will convey a good title, though the wife did not join in the instrument as required to release the homestead when it was executed.¹ The fact that the husband and wife may be living apart from each other, if not divorced, will not in any sense obviate the necessity of complying with the statute requiring the wife to join.² But the husband may convey his homestead to his wife by deed-poll, though the law require the conveyance to be by both.³ This is true because these laws are intended for the benefit of the wife. Neither herself nor husband would be in a position to attack the validity of such a conveyance, as the acceptance of the deed by the wife would be tantamount to joining therein.

§ 174. Criminal conversation — Right of husband to sue for.— Criminal conversation is the name given to the offense of adultery committed with the wife from a civil standpoint, by reason of which the husband may sue the wrongdoer for civil damages arising from the injury. The gist of this action is the loss of the affection and society of the wife, the shame, mortification and disgrace incident to such an unfortunate occurrence, and the consequent disappointment of the husband in the fidelity, constancy and virtue of his wife.⁴ That the husband and wife lived happily together afterwards is no defense to the action, and this fact cannot be shown in evidence. Indeed, it may be as much or more torture to still live with the wife as to abandon her. And the forgiveness, if such it might be called, is the more commendable in the husband.⁵ And the action lies at the instance of the husband, though before he brings the suit his wife sues him for and obtains a divorce from him.⁶ But the action cannot be maintained, how-

¹ *Stephens v. Holman*, 112 Cal. 345, 44 Pac. Rep. 670.

² *Larson v. Butts*, 22 Neb. 370, 35 N. W. Rep. 190.

³ *Milwaukee Mechanics' Mutual Ins. Co. v. Ketterlin*, 24 Ill. App. 188; *Furrow v. Athey*, 21 Neb. 671, 33 N. W. Rep. 208.

⁴ *Van Vacter v. McKillip*, 7 Blackf. (Ind.) 578; *Cornelius v. Hambay*, 150 Pa. St. 359, 24 Atl. Rep. 515; *Wood v. Mathews*, 47 Iowa, 409; *Croze v. Rutledge*, 81 Ill. 266; *Weldon v. Timbrell*,

5 T. R. 357; *Miller v. Lachman* (Mich.), 75 N. W. Rep. 284; *Mathers v. Mazet*, 164 Pa. St. 580, 30 Atl. Rep. 434; *McAlmont v. McClelland*, 14 S. & R. (Pa.) 361; *Smith v. Meyers* (Neb.), 71 N. W. Rep. 1006; Same case re-affirmed, 74 N. W. Rep. 277.

⁵ *Van Vacter v. McKillip*, 7 Blackf. (Ind.) 578.

⁶ *Wood v. Mathews*, 47 Iowa, 409, 411. See, too, *Dickerman v. Graves*, 6 Cush. (Mass.) 308; *Ratcliff v. Wales*, 1 Hill (N. Y.), 63.

ever, where the intercourse takes place after a voluntary and mutually agreed upon separation between the husband and wife; for they thereby practically renounce the marital relation, and the husband will not be heard to complain of the seduction of his wife whom he has voluntarily put away.¹ At common law it seems that the wife could not maintain an action for the alienation of the affections of her husband by another, nor for his adultery, as she could not sue in her own name so long as the marriage existed, her existence being blended, by a legal fiction, in his; but where, by statute, a married woman is enabled to sue as a *feme sole*, it is very properly held that she may maintain such an action, just as the husband can sue for the injury resulting in the adultery of his wife.² In proving the act of adultery on the part of the wife the husband will not be restricted to direct evidence, for this would make the act one very difficult of proof, owing to the secrecy usually attending such conduct; but proof of any facts or acts legitimately tending to establish the intercourse, though from inference only, is proper, and when strong enough to support the conclusion is sufficient.³ And the husband will not be deprived of his right of action because he cohabits with his wife after full knowledge of the act, as he may wish to forgive and redeem her rather than turn her out of his home, and this fact is not by any means inconsistent with the injury the husband must bear.⁴ In an action for criminal conversation it may be shown in mitigation of damages that the husband lives apart from his wife and neglects to support or care for her.⁵ His conduct when informed of his wife's infidelity is also admissible, as tending to show greater or less mortification.⁶

§ 175. Action by husband for criminal conversation — Proof — Degree of proof required.— Before the husband can maintain an action against an alleged wrongdoer for the seduc-

¹ Weedon v. Timbrell, 5 T. R. 357; Fry v. Derstler, 2 Yeates (Pa.). 278.

² Westlake v. Westlake, 34 Ohio St. 621.

³ Cornelius v. Hambay, 150 Pa. St. 859, 24 Atl. Rep. 515.

⁴ Smith v. Meyer (Neb.), 71 N. W. Rep. 1006; Stumm v. Hummel, 39 Iowa, 478, 483; Sanborn v. Neilson, 4

N. H. 501; Verholf v. Van Houwenlengen, 21 Iowa, 429; Bromley v. Wallace, 4 Esp. 237; Sikes v. Tippins, 85 Ga. 231, 11 S. E. Rep. 662.

⁵ Prettyman v. Williamson (Del.), 39 Atl. Rep. 731.

⁶ Hutchins v. Kimmell, 31 Mich. 126.

tion of, or rather intercourse with, his wife, it is incumbent upon him to show affirmatively a marriage valid in every sense. He must prove one that is valid until set aside, or voidable, in other words, but not void. It is not enough to prove the alleged marriage by reputation of the parties, nor that they hold themselves out to the world as married persons, though this is usually sufficient to establish the marriage in civil actions generally.¹ But ordinarily the declarations and confessions of the party accused of the injury will be sufficient to establish the marriage in cases of this kind.² And where the husband and wife have been divorced before the trial, the unlawful intercourse may be proven by the wife herself at the instance of the husband, for she is then but a stranger, and the rule forbidding the testimony of the husband or wife for or against the other can have no application.³ But it is no bar to an action for criminal conversation that the offense was committed forcibly and against the will of the wife, so as to be rape, and punishable as such under the criminal law.⁴ Nor is the husband restricted to proof of the intercourse precisely at the time laid in the complaint, but he may show the act to have been committed at any time within the period of limitation.⁵

§ 176. **Alienation of affection — Suit by husband.**— As the wife, being authorized to sue alone, may sue for the alienation of the affection of her husband, it very naturally follows, upon the same principle, that the action lies also at the instance of the husband, and he may therefore recover from a stranger the usual damages where his wife has been estranged from him by another.⁶ Such a wrongdoer is liable to the husband for the

¹ Catherwood v. Colson, 8 Jur. 1076; Kibby v. Rucker, 1 A. K. Marsh. (Ky.) 391; Hutchins v. Kimmell, 81 Mich. 126; State v. Johnson, 12 Minn. 476; Dumas v. State, 14 Tex. App. 464.

² Finney v. State, 3 Head (Tenn.), 544; Miles v. United States, 103 U. S. 304.

³ Dickerman v. Graves, 6 Cush. (Mass.) 308; Ratcliff v. Wales, 1 Hill (N. Y.), 63. See *contra*, however, Crose v. Rutlege, 81 Ill. 266.

⁴ Eghert v. Greenwalt, 44 Mich. 245, 6 N. W. Rep. 654.

⁵ Johnson v. Disbrow, 47 Mich. 59, 10 N. W. Rep. 79.

⁶ Kansz v. Ryan, 51 Iowa, 232, 1 N. W. Rep. 485; Childs v. Muckler (Iowa), 75 N. W. Rep. 100; Hartpence v. Rodgers (Mo.), 45 S. W. Rep. 650; Modisett v. Pike, 74 Mo. 636; Huot v. Wise, 27 Minn. 68, 6 N. W. Rep. 425; Perry v. Lovejoy, 49 Mich. 529, 14 N. W. Rep. 485.

damages resulting, regardless of motives.¹ In fact, it would seem upon principle to be rare, indeed, if the motive in thus breaking up a family could be a good one. In actions of this kind it is held that the conduct of the wife towards the person charged with the wrong may be proven as tending to show the relation existing between such stranger and the wife.² But the husband will not be permitted to recover when he has sanctioned or connived at the acts bringing about the alienation.³ In a case, however, where the circumstances reveal a wilful and malicious purpose on the part of the wrongdoer, exemplary damages may be recovered.⁴ There would certainly seem to be no good reason for denying exemplary damages in cases of this kind, for the wrong is of a nature most calculated to effect revenge or gratify malice or ill-will. It is not necessary to set out the precise language or means used whereby the affection was alienated. It is sufficient that the wrong has been committed.⁵

§ 177. Alienation of affection by stranger — Remedy.— No stranger or other person, whether male or female, has any right to alienate the affections of either the wife or the husband, which is so well calculated to break up the peace and happiness of homes and families, it necessarily having this effect. Of this fact, and this tendency of such an act, all intelligent persons are presumed to be well aware. If, however, any person alienates, by whatsoever means, whether by seductive charms, protestations of love, promise of desirable things, great felicity or otherwise, the affections of either the husband or wife, the injured party has his or her cause of action, as the case may be, against the person guilty of this reprehensible conduct, and may recover damages for the loss of support, society, disgrace, wounded feelings, and kindred injuries arising therefrom.⁶ In an action of this kind by the husband,

¹ Hartpence v. Rodgers (Mo.), 45 S. W. Rep. 650.

² Childs v. Muckler (Iowa), 75 N. W. Rep. 100.

³ Prettyman v. Williamson (Del.), 89 Atl. Rep. 731.

⁴ Prettyman v. Williamson (Del.), 89 Atl. Rep. 731.

⁵ Bockman v. Ritter (Ind.), 52 N. E. Rep. 100.

⁶ Bennett v. Bennett, 116 N. Y. 584, 23 N. E. Rep. 17; Wilson v. Coulter, 29 App. Div. 85, 51 N. Y. S. 804; Mehrhoff v. Mehrhoff, 26 Fed. Rep. 13; Hartpence v. Rodgers (Mo.), 45 S. W. Rep. 650; Hutcheson v. Peck, 5 Johns.

it is not necessary to allege or prove loss of service as a consequence of the wrongful act, for the action is maintainable without this, the loss of consortium and conjugal society being the chief basis of the right to sue.¹ Nor is it necessary to show any direct pecuniary loss on the part of the person suing.² The cause of action may accrue while the wife still lives with her husband. No one has the right to alienate the affections of the wife simply because they lived together before, or continue to do so after.³ Ordinarily, however, there is no cause of action if the husband or wife voluntarily fall in love with another, where nothing is done or said by such person calculated to alienate affection, and no purpose or intention of so doing appears on the part of the person with whom the husband or wife becomes infatuated, as in such a case the person thus voluntarily estranging himself or herself, as the case may be, would be at fault rather than the third person.⁴

§ 178. Right of wife to sue alone for alienation of affection.—At common law, of course, the wife could not bring any suit alone during the life of the husband on account of the legal unity created by the marriage. But it is different under some of the modern statutes. Thus where the statute provides that “a married woman may, while married, sue and be sued in the same manner as if she were unmarried,” it is very correctly held that she may sue alone, and in her own name, for the alienation of the affections of her husband.⁵ But the wife

196; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. Rep. 328; *Manwarren v. Mason*, 79 Hun, 592, 29 N. Y. S. 915; *Jaynes v. Jaynes*, 39 Hun, 40; *Baker v. Baker*, 16 Abb. N. C. 293; *Warner v. Miller*, 17 Abb. N. C. 221; *Bassett v. Bassett*, 20 Ill. App. 543.

¹ *Rinehart v. Bills*, 82 Mo. 534; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. Rep. 17; *Hermance v. James*, 32 How. Pr. 142; *Bigaonette v. Panlet*, 134 Mass. 123.

² *Prettyman v. Williamson* (Del.), 39 Atl. Rep. 731.

³ *Rinehart v. Bills*, 82 Mo. 534; *Hermance v. James*, 47 Barb. 120; *Hoard v. Peck*, 56 Barb. 202; *Her-*

mance v. James, 32 How. Pr. 142; *Van Olinda v. Hall*, 88 Hun, 452, 34 N. Y. S. 777.

⁴ *Witman v. Egbert*, 50 N. Y. S. 3; *Warner v. Miller*, 17 Abb. N. C. 221; *Westlake v. Westlake*, 34 Ohio St. 621.

⁵ *Bennett v. Bennett*, 116 N. Y. 584, 23 S. E. Rep. 17; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13, 14; *Gerner v. Gerner* (Pa.), 39 Atl. Rep. 884; *Brieman v. Paasch*, 7 Abb. N. C. 249; *Baker v. Baker*, 16 Abb. N. C. 293; *Warner v. Miller*, 17 Abb. N. C. 221; *Churchill v. Lewis*, 17 Abb. N. C. 226; *Foot v. Card*, 58 Conn. 1, 18 Atl. Rep. 1027; *Jaynes v. Jaynes*, 39 Hun,

could not sue at common law for this injury without joining her husband.¹ Under the modern statutes a divorced wife may maintain an action for the alienation of the affections of the husband during the time the marriage contract was in force.² The action may be maintained under the common law, though the wife could not sue alone. It is grounded upon the well-established and familiar principle that for every wrong the law affords a redress. Being emancipated by statute so as to be able to bring and maintain an action alone, and in her own behalf, she may sue under the enabling statutes for a common-law injury or tort.³ And of course the alienation of affection from a wife or husband is a wrong or injury to the other which the law will punish in damages. The law presumes, too, as it should, that a husband entertains an affection for his wife.⁴ This presumption is only one of fact, however, and it may always be overcome by affirmative evidence to the contrary of sufficient strength to overturn any presumption of fact in ordinary cases.⁵

§ 179. Wife's paraphernalia.—The wife's paraphernalia, as the term is used at common law, consists of her wearing apparel and such personal adornments as are suitable to her condition, station and rank in life. It includes her jewelry and any suitable personal ornaments. In her paraphernalia the wife has a contingent interest depending upon her survivorship of her husband. If he dies before she does without having in his life-time disposed of same, it becomes hers absolutely and

40; *Seaver v. Adams*, 66 N. H. 142, 19 Atl. Rep. 776; *Westlake v. Westlake*, 34 Ohio St. 621; *Bassett v. Bassett*, 20 Ill. App. 543; *Postlewaite v. Postlewaite*, 1 Ind. App. 473, 28 N. E. Rep. 99; *Simmons v. Simmons*, 4 N. Y. S. 221; *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. Rep. 389; *Warren v. Warren*, 89 Mich. 123, 50 N. W. Rep. 842; *Doe v. Roe*, 82 Me. 503, 20 Atl. Rep. 83.

¹ *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. Rep. 116; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. Rep. 328.

² *Beach v. Brown* (Wash.), 55 Pac. Rep. 46; *Postlewaite v. Postlewaite*, 1 Ind. App. 473, 28 N. E. Rep. 99;

Clow v. Chapman, 125 Mo. 101, 28 S. W. Rep. 328; *Prettyman v. Williamson* (Del.), 39 Atl. Rep. 731; *Michael v. Dunkle*, 84 Ind. 544. See *contra*, *Logan v. Logan*, 77 Ind. 558. This case is vigorously criticised in the later case of *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. Rep. 389.

³ *Foot v. Card*, 58 Conn. 1, 18 Atl. Rep. 1027; *Postlewaite v. Postlewaite*, 11 Ind. App. 473, 28 N. E. Rep. 99.

⁴ *Beach v. Brown* (Wash.), 55 Pac. Rep. 46.

⁵ *Beach v. Brown* (Wash.), 55 Pac. Rep. 46.

cannot be claimed by the administrators of the husband.¹ But so long as the husband lives he may sell or otherwise dispose of this, even against her will.² The paraphernalia of the wife is subject to the debts of her husband where there is a deficiency of assets, though the right of his creditors to resort to this particular property does not extend to the actual necessary wearing apparel of the wife.³ And gifts for personal adornment from third persons for the sole and separate use of the wife are not subject to the claims of the creditors of the husband.⁴ But a gold watch given by the husband to the wife is liable for his debts as part of her paraphernalia.⁵ The right of the husband to dispose of the wife's paraphernalia must be exercised during his life-time. And he cannot even devise such by will, which takes effect only at his death.⁶

§ 180. Effect of marriage on wife's domicile.—The general rule of the domicile of the wife is that, as soon as the contract is consummated she takes, *ipso facto*, the domicile of her husband. She becomes subject to the laws under which he lives, surrendering her old domicile when different from his, and having no other thereafter, so long as they live, apart from that of her husband. The unity in law of the two precludes the idea of a different domicile, and, as the husband is regarded in law as the head of the family, and is burdened with many duties and liabilities by reason of this, it is best that the domicile of the wife follow and remain that of her husband.⁷

¹ 1 Bl. Comm. 435, 436; *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212; *In re Grant*, 2 Sto. (U. S. C. C.) 312.

² *Stewart, Husband and Wife*, § 187; 2 Bl. Comm. 435, 436; *Howard v. Menifee*, 5 Ark. 668; *Tllexan v. Wilson*, 43 Me. 186, 190. And see *McCormick v. Pennsylvania Cent. Ry. Co.*, 99 N. Y. 65, 1 N. E. Rep. 99.

³ *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212; *Howard v. Menifee*, 5 Ark. 668; *Ridant v. Earl of Portsmouth*, 2 Atk. 104; *In re Grant*, 2 Sto. (U. S. C. C.) 312, 319; 2 Bl. Comm. 436; *Tucker v. Phipps*, 3 Atk. 359.

⁴ *In re Grant*, 2 Sto. (U. S. C. C.) 312.

⁵ *Howard v. Menifee*, 5 Ark. 668.

See, to like effect, *Tllexan v. Wilson*, 43 Me. 186.

⁶ *Seymore v. Trefilian*, 3 Atk. 258; 2 Bl. Comm. 436; *Howard v. Menifee*, 5 Ark. 668; *Tipping v. Tipping*, 1 P. Wms. 729, 730.

⁷ *Warrender v. Warrender*, 2 C. & F. 488; *Hicks v. Skinner*, 71 N. C. 539, 543; *Vischer v. Vischer*, 12 Barb. 640; *Ashbaugh v. Ashbaugh*, 17 Ill. 474; *Story. Conf. Laws*, § 195; *Smith v. Moorehead*, 6 Jones' Eq. (N. C.) 360; *Sherck v. Sherck*, 32 Tex. 578; *Maguire v. Maguire*, 7 Dana (Ky.) 181; *Smith v. Smith*, 19 Neb. 706, 28 N. W. Rep. 296; *Greene v. Greene*, 11 Pick. (Mass.) 410; *Brewer v. Linnaeus*, 36

§ 181. Status of wife's domicile when living apart from her husband.— It has been held that where the husband and wife mutually separate permanently, each thereafter living in a separate jurisdiction, the domicile of the wife is no longer that of the husband. That by such act of separation she acquires for herself a domicile and residence regardless of her husband.¹ But there can be no good reason for holding that a wife, by separating from her husband, even by mutual consent, may obtain and acquire a domicile and status different from his. This is partly annulling the contract of marriage by such consent, for the theory that the domicile of the husband and wife is one is founded on the very unity of their civil existence by the contract of marriage. By no amount of mutual consent can the contract of marriage be added to or detracted from in the least. For, if it can be evaded or annulled in the least part by mutual agreement, where is the limit to be fixed? If it can be annulled in part, why not in whole? The husband is the head of the family, and, as such, must provide for his wife and children. He cannot shield himself from this duty by an agreement with his wife that they will partly sever their marriage relation; that she may live separately from him, and he from her. All such attempted annulments, in whole or in part, are contrary to the spirit of the law and against public policy. The better reason, therefore, is, no separation short of a decree of a court of competent jurisdiction severing the marriage tie can give the right to select a domicile for the wife different from that of her husband, though

Me. 428; *Hairston v. Hairston*, 27 Miss. 704; *McAfee v. Kentucky University*, 7 Bush (Ky.), 135; *Hunt v. Hunt*, 72 N. Y. 217; *Johnston v. Turner*, 29 Ark. 280; *Smith v. Sun Publishing Ass'n*, 55 Fed. Rep. 240, 5 C. C. A. 91; *Dolphin v. Robins*, 7 H. L. Cas. 389; *Remey v. Burlington*, 80 Iowa. 470, 45 N. W. Rep. 899; *Wingfield v. Rhea*, 77 Ga. 84; *Parett v. Palmer*, 8 Ind. App. 356, 35 N. E. Rep. 713; *Harrison v. Harrison*, 20 Ala. 629; *Dorsey v. Brigham* (Ill.), 52 N. E. Rep. 803.

¹ *Chapman v. Chapman*, 129 Ill. 386,

21 N. E. Rep. 806; *In re Florence's Will*, 7 N. Y. S. 578. In this last case it was held that the domicile of the wife, thus separated from her husband, who, during such separation, had brought up the children at her own expense, would draw to it that of the children also. But it is difficult to see how, at common law, the domicile of the wife can be different from that of her husband, simply because they agree to live apart, and, for the same reason, that of the children should remain that of the father.

they separate by mutual agreement, never intending to return to each other, and though they thereafter live in different states.¹ A Scotchman, domiciled in Scotland, married an English woman, after which they went to Scotland and stayed a short time. They sometime after this agreed upon a separation, and articles were accordingly drawn up and executed by them. From the time of the voluntary separation the wife resided abroad, the husband continuing to live and have his domicile in Scotland. He began an action for divorce against her in the Scotch courts. The question arose whether the wife was, under the facts, amenable to the laws of Scotland. It was held by the court of sessions that her domicile was in Scotland, as was her husband's, and that she was therefore subject to the jurisdiction of the courts of that country. This ruling was affirmed in the House of Lords.² If the domicile of the parties had been in England, the husband could not have gone to Scotland to avail himself of the divorce laws of that country to the extent of affecting the marriage in England. It would continue in force in the latter country regardless of any jurisdiction that might be improperly taken of the parties, in such case, by the Scotch tribunals.³

§ 182. Domicile of wife — Exceptions to the rule.— Contrary to the general rule that the domicile of the husband is that of the wife, the law grants to the wife, when it is absolutely necessary for the enforcement or assertion of her rights, the privilege of acquiring a domicile or residence separate and apart from that of her husband. So when, under the law, the wife is entitled to sue for a divorce, this fact alone is sufficient to enable her to acquire whatever domicile she may wish. Having a cause of action for divorce, the husband has not the right to longer dictate the status of his wife. She is not required to fight her way in the forum of her husband's domicile, but, having the right to sue, the law also recognizes in her the right to select the forum of the domicile of her choice — when

¹ Johnston v. Turner, 29 Ark. 280. entirely *contra*, Harrison v. Harrison,

² Warrender v. Warrender, 2 C. & 20 Ala. 629; Reynolds v. Sweetser, 15 F. 488; Dolphin v. Robins, 7 H. L. Cas. 389. See also, to like effect, Gray (Mass.), 78.

³ Shaw v. Moore, L. R. 3 H. L. 55; Anderson v. Watts, 138 U. S. 694, 11 Sup. Ct. Rep. 449; and see, appar- Dolphin v. Robins, 7 H. L. Cas. 390.

jurisdiction can be had, of course.¹ And when the parties are divorced *a mensa et thoro*, the domicile of the husband ceases to be that of the wife, for it has then been judicially determined that he has no longer any right to the custody or society of his wife, and the reason of the rule that the domicile of the husband is that of the wife ceases, and the law of domicile falls with it.² Upon principle, and as a general rule, the husband would have no right to change the domicile of his wife arbitrarily, or for purposes of revenge, spite or punishment of her. It must be in good faith, and with good, not bad, motives. But whenever in his *bona fide* judgment it becomes proper or necessary to do so, having in view a proper regard and consideration for the welfare of his family, he may change his domicile and move to another place, and a refusal of the wife to then accompany him would ordinarily be a desertion of him on her part.³ There is another exception to the rule that the domicile of the husband is that of the wife. Whenever, because of ill-treatment, abuse, or any misconduct whatever on the part of the husband toward the wife, such as would justify her in seeking shelter or protection at the hands of strangers, she is driven to the necessity of seeking peace or safety elsewhere, the right of the husband to name the domicile of the wife is at an end. The law will not permit him to prejudice his wife by fixing her domicile at a certain place, when, by reason of his wrong to her, he has forfeited all right of control over her, or because of which he would be estopped to insist that her domicile should be the same as his.⁴ And when the husband is guilty of conduct towards his wife such as would entitle her to a divorce, or is guilty of such neglect and cruelty as to make her condition practically intolerable, she at once has the right in law to select and acquire a domicile other than that of her husband.⁵ The husband may also by his misconduct, fraud or ill-treat-

¹ Cheever v. Wilson, 9 Wall. 108; Barber v. Barber, 21 How. (U. S.) 582; Ditson v. Ditson, 4 R. L. 87; Smith v. Smith, 43 La. Ann. 1140, 10 S. Rep. 248.

² Barber v. Barber, 21 How. (U. S.) 582; Vischer v. Vischer, 12 Barb. 640.

³ Wilcox v. Wilcox, 10 Ind. 436.

⁴ Cooley, Const. Lim. (4th ed.), p. 502; Cheever v. Wilson, 76 U. S. 108.

⁵ Frary v. Frary, 10 N. H. 61; Tolen v. Tolen, 2 Blackf. (Ind.) 407.

ment of his wife preclude himself of the right to assert his domicile in any particular place to the prejudice of any of her rights.¹

§ 183. Domicile — Widow.—While the domicile of the husband only binds the wife so long as they both live, yet the domicile of the widow remains the same as that of the husband at the time of his death until she acquires another. And the presumption of law is that such domicile of her husband remains hers until she chooses another and actually makes the change.² But of course as soon as the husband dies, the wife emerges from all the disabilities of coverture, and may at any time thereafter change her domicile at pleasure without consulting any one, just the same as could any other person laboring under no disability.

§ 184. Estate by entirety.—A gift, conveyance, bequest or other transfer of land to a husband and wife vests in them an estate by entirety. As expressed by Chancellor Kent, “if an estate in land be given to the husband or wife, or a joint purchase be made by them during coverture, they are not properly joint tenants, nor tenants in common, for they are but one person in law, and cannot take by moieties. They are both seized of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole.”³ Ordinarily, a con-

¹ *Streitwolf v. Streitwolf* (N. J. Eq.), 41 Atl. Rep. 876.

² *Pennsylvania v. Ravenel*, 21 How. (U. S.) 103. And in determining the domicile of any one, it is the province of the court to say what is a domicile in law, and of the jury to find whether or not the facts sustain the contention under the law. It is a question of mixed law and fact. *Pennsylvania v. Ravenel*, 63 U. S. 103.

³ *Fisher v. Provin*, 25 Mich. 347; 2 Bl. Comm. 182; *Meyers v. Reed*, 17 Fed. Rep. 401; 2 Kent. Comm. 132, 362; *Kline v. Ragland*, 47 Ark. 111, 14 S. W. Rep. 474; *Robinson v. Eagle*, 29 Ark. 202; *Gibson v. Zimmerman*, 12 Mo. 385; *Hall v. Stephens*, 65 Mo. 670; *Marburg v. Cole*, 49 Md. 402;

Jones v. Chandler, 40 Ind. 588; *Den v. Whitmore*, 2 Dev. & B. (N. C.) 537; *Den v. Branson*, 5 Ired. (N. C.) 426; *Banton v. Campbell*, 9 B. Mon. (Ky.) 587, 594; *Humberd v. Collings* (Ind.), 50 N. E. Rep. 314; *Torrey v. Torrey*, 14 N. Y. 430; *Stuckey v. Keefe*, 26 Pa. St. 397; *Doe v. Parrott*, 5 T. R. 654; *Wales v. Coffin*, 13 Allen (Mass.), 213; *Simons v. McLain*, 51 Kan. 160, 32 Pac. Rep. 919; *Hume v. Hopkins*, 140 Mo. 65, 41 S. W. Rep. 784; *Jackson v. Stephens*, 16 Johns. 110; *Kip v. Kip*, 33 N. J. Eq. 213; *Arnold v. Arnold*, 30 Ind. 305; *Woodford v. Higly*, 1 Winst. (N. C.) 234; *Den v. Hurdensburg*, 5 Halst. (N. J.) 42; *Wright v. Saddler*, 20 N. Y. 320; *Ketchum v. Walsworth*, 5 Wis. 95; *Bevins v.*

veyance which would create in two persons not married an estate in common will vest an estate by entirety in husband and wife.¹ It is not at all necessary to describe the grantees as husband and wife in order to create the estate.² In case of the creation of an estate by entirety the husband has no authority to convey any part of it without the wife joining, and *vice versa*;³ for upon the death of the husband the whole estate vests in the wife, and upon the death of the wife first it vests in the husband.⁴ This estate can only exist when the conveyance is made to the husband and wife jointly. If the conveyance be to the husband and wife and to a third person, one or more, they will all take as joint tenants at common law, except that the husband and wife would hold by entirety the part conveyed to them. For instance, a conveyance to A. and B., husband and wife, and C., a stranger, would create a joint tenancy as between the three grantees, but the husband and wife, as

Cline, 21 Ind. 37, 41; Falls v. Hawthorne, 30 Ind. 444; Hunt v. Blackburn, 128 U. S. 464, 9 Sup. Ct. Rep. 125; Winans v. Peebles, 82 N. Y. 423; Simpson v. Pearson, 31 Ind. 1; Taul v. Campbell, 7 Yerg. (Tenn.) 319; Dexter v. Billings, 110 Pa. St. 135, 1 Atl. Rep. 180; Thornton v. Thornton, 3 Rand. (Va.) 179; McDuff v. Beauchamp, 50 Miss. 531; Allen v. Tate, 58 Miss. 585; Bennett v. Child, 19 Wis. 362; Hulett v. Inlow, 57 Ind. 412; Bates v. Seely, 46 Pa. St. 248; Bartles v. Nunan, 92 N. Y. 152; Harding v. Springer, 14 Me. 407; Shaw v. Hearsy, 5 Mass. 520; Draper v. Jackson, 16 Mass. 480; Pierce v. Chase, 108 Mass. 254; French v. Mehan, 56 Pa. St. 286; Diver v. Diver, 56 Pa. St. 106; Pray v. Stebbins, 141 Mass. 210, 4 N. E. Rep. 824; Fleek v. Zillhaver, 117 Pa. St. 213, 12 Atl. Rep. 420; Doe v. Garrison, 1 Dana (Ky.), 25; Babbit v. Scroggin, Duv. (Ky.) 272; Berrigan v. Fleming, 2 Lea (Tenn.), 271; Davis v. Clark, 26 Ind. 424; Dowling v. Salliotte, 83 Mich. 131, 47 N. W. Rep. 225; Allen v. Allen, 47 Mich. 74, 10 N. W. Rep. 113; Carver v. Smith, 90 Ind. 222; Patton v. Rankin, 63 Ind. 245; Gar-

ner v. Jones, 52 Mo. 68; Bronson v. Hull, 6 Vt. 309; Fox v. Fletcher, 8 Mass. 274; Ames v. Norman, 4 Sneed (Tenn.), 683; Hemingway v. Scales, 42 Miss. 1; Wilson v. Johnson, 4 Kan. App. 747, 46 Pac. Rep. 833; Green v. King, 2 W. Bl. 1211.

¹ McCurdy v. Canning, 64 Pa. St. 39; Ketchum v. Walsworth, 5 Wis. 95; McDuff v. Beauchamp, 50 Miss. 531.

² Chandler v. Cheney, 37 Ind. 391.

³ Insurance Co. v. Reash, 40 Mich. 241; Robinson v. Eagle, 29 Ark. 202, 205; Ames v. Norman, 4 Sneed (Tenn.), 683; Jackson v. McConnell, 19 Wend. 175; Doe v. Parrott, 5 T. R. 654; Jacobs v. Miller, 50 Mich. 119, 15 N. W. Rep. 42; Naylor v. Minock, 96 Mich. 182, 55 N. W. Rep. 604; Branch v. Polk, 61 Ark. 388, 33 S. W. Rep. 424; Zornlein v. Bram, 100 N. Y. 12, 2 N. E. Rep. 388; Pray v. Stebbins, 141 Mass. 210, 4 N. E. Rep. 824; Green v. King, 2 W. Bl. 1211.

⁴ Robinson v. Eagle, 29 Ark. 202; Bates v. Seely, 46 Pa. St. 248; Harrer v. Wallner, 80 Ill. 197; McDermott v. French, 15 N. J. Eq. 78.

between each other, would take by entirety two-thirds of the estate, which two-thirds would, upon the death of either, survive to the other, and could not, in the life-time of both, be conveyed by either without the consent and joining of the other.¹ As the husband and wife, holding as tenants by the entirety, take title from the same source and at the same time, it naturally follows that whatever will defeat the title of one will defeat that of the other; for the estate is inseparable in life and vests in the survivor at the death of one of the tenants.² As the interest of neither party can be granted by the other alone during the life of both, the right of neither, during the life of both, is subject to execution.³ Not only is the realty itself exempt from execution against either tenant, but the same rule applies to the crops raised thereon as long as they remain undivided by the parties.⁴ And not only does the law forbid either to dispose of land held by entirety, but it likewise forbids that either incumber it.⁵ The estate the wife would have is not a separate estate with reference to which she may contract by virtue of the statutes generally in force permitting married women to make contracts concerning their separate property.⁶ Nor can either devise or bequeath his respective interest, for a will does not take effect until death, and at the death of either the fee vests absolutely in the other by operation of law, so there is nothing for the devisee to take unless the testator should survive.⁷ As a rule the husband, especially where he has the management and control of the estate held by entirety with the consent of the wife, may sue alone for any damages thereto caused by the acts or omissions of a third person.⁸ And the husband and wife may jointly mortgage the estate by entirety, even to secure a debt of the husband, where by statute

¹ *Johnson v. Hart*, 6 Watts & S. (Pa.) 319.

² *Manwaring v. Powell*, 40 Mich. 371, 375; *Vinton v. Beamer*, 55 Mich. 559, 22 N. W. Rep. 40.

³ *Vinton v. Beamer*, 55 Mich. 559, 22 N. W. Rep. 40; *Dickey v. Converse* (Mich.), 76 N. W. Rep. 80; *Thomas v. De Baum*, 14 N. J. Eq. 37.

⁴ *Dickey v. Converse* (Mich.), 76 N. W. Rep. 80.

⁵ *Speier v. Opfer*, 73 Mich. 35, 40 N.

W. Rep. 909; *Crooks v. Kennett*, 111 Ind. 347, 12 N. E. Rep. 715; *Coats v. Gordon*, 144 Ind. 19, 41 N. E. Rep. 1044; *Naylor v. Minock*, 96 Mich. 182, 55 N. W. Rep. 664.

⁶ *Speier v. Opfer*, 73 Mich. 35, 40 N. W. Rep. 909.

⁷ *Speier v. Opfer*, 73 Mich. 35, 40 N. W. Rep. 909; *Dickey v. Converse* (Mich.), 76 N. W. Rep. 80.

⁸ *Sheridan Gas, O. & C. Co. v. Pearson* (Ind.), 49 N. E. Rep. 357.

the wife is authorized to bind or convey her separate estate to pay the debts of her husband.¹ But if not in some way incumbered during the life of the parties, and the wife should survive the husband, she would take the whole estate free from the claims of the husband, for she would not succeed to the estate through the husband in any way, but through the original grantor and by virtue of his conveyance.² The law supposes that when a grantor conveys to husband and wife jointly, he intends that the estate conveyed take all the incidents, liabilities and limitations of an estate by entirety. The idea further finds support in the well-recognized principle that the law of the land enters into and becomes part and parcel of all contracts. That, in other words, all contracts are made with a view to the law, and that they are intended to have the effect the law gives them.

§ 185. Estate by entirety — Not changed by statute empowering married women to manage their own property.— It is generally held that statutes of the various states now generally in force, authorizing and empowering a married woman to manage her own property and to contract with reference thereto as though she were a *feme sole*, are not inconsistent with the idea of an estate by entirety. Nor, of course, are they repugnant to the policy and principles of the law relating thereto.³ So a statute which provides that “the property of the wife shall be protected from the debts of the husband” will not author-

¹ People's Building & Loan Ass'n v. Billing, 104 Mich. 186, 62 N. W. Rep. 373; Rogers v. Benson, 5 Johns. Ch. 431; McLeod v. Aetna Life Ins. Co., 107 Ind. 394, 6 N. E. Rep. 230.

² French v. Mehan, 56 Pa. St. 286.

³ McCurdy v. Canning, 64 Pa. St. 39; Diver v. Diver, 56 Pa. St. 106, 109; Robinson v. Eagle, 29 Ark. 202; Branch v. Polk, 61 Ark. 388, 33 S. W. Rep. 424; Kip v. Kip, 33 N. J. Eq. 213; Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. Rep. 695; Chandler v. Chaney, 37 Ind. 391; Fisher v. Provin, 25 Mich. 347; Shinn v. Shinn, 42 Kan. 1, 21 Pac. Rep. 813; Carver v. Smith, 90 Ind. 222; Marburg v. Cole,

49 Md. 402; Bartles v. Nunan, 92 N. Y. 152; Zorntlein v. Bram, 100 N. Y. 12, 2 N. E. Rep. 388; Bennett v. Child, 19 Wis. 362; Baker v. Stewart, 40 Kan. 442, 19 Pac. Rep. 904; Myers v. Reed, 17 Fed. Rep. 401; Pray v. Stebbins, 141 Mass. 219, 4 N. E. Rep. 824; McDermott v. French, 15 N. J. Eq. 78; Cloos v. Cloos, 8 N. Y. S. 660; Thomas v. De Baum, 14 N. J. Eq. 37; Den v. Whitmore, 2 Dev. & Bat. (N. C. Law), 537; Arnold v. Arnold, 30 Ind. 305; Doe v. Garrison, 1 Dana (Ky.), 35; Bronson v. Hull, 16 Vt. 309. See Bader v. Dyer (Iowa), 77 N. W. Rep. 469, for the rule in this state under statute.

ize the sale by a mortgagee or judgment creditor of the husband of the estate by the entirety or any part thereof; but rather forbids it.¹ And where the statute permits the wife to own and control property as a *feme sole* and to own an undivided one-half of land conveyed to her and her husband, the estate thus conveyed to the two nevertheless goes to the survivor.²

§ 186. Estate by entirety — Right of husband to mortgage his interest under statutes authorizing married women to control their own property.— The supreme court of Arkansas and the court of appeals of New York have decided that the statutory enactments empowering married women to manage and control their separate property and to contract with reference thereto as though single so changes the common law that the husband may mortgage his interest in land held by himself and wife as tenants by the entirety, and that a purchaser at foreclosure sale becomes a tenant in common with the wife.³ That, in the event he should survive, he succeeds to the absolute fee by virtue of his purchase. The learned New York court vindicates its opinion in a very able and forcible manner. But both courts admit the fact that these statutes relating to married women do not do away with the common-law estate by entirety, and that a conveyance to husband and wife jointly will still, as at common law, create this estate. But it is contended that, as the wife is now enabled to control her individual property, the nature of the estate is changed, because the husband, at common law, was entitled to the rents and profits as well as control of the wife's lands during her life. This life interest was subject to be proceeded against by the creditors of the husband in their efforts to realize any indebtedness he owed.⁴ Of course, where the law permits a married woman to dispose of her property as a *feme sole*, she may convey any interest in her lands, or lands in which she has an

¹ McCubbin v. Stanford, 85 Md. 378, 37 Atl. Rep. 214.

² Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. Rep. 695.

³ Branch v. Polk, 61 Ark. 388, 33 S. W. Rep. 424; Hiles v. Fisher, 144 N. Y. 306, 89 N. E. Rep. 337.

⁴ Ames v. Norman, 4 Sneed (Tenn.), 683; Jackson v. McConnell, 19 Wend. 175; Barber v. Harris, 15 Wend. 615; Pray v. Stebbins, 141 Mass. 219, 4 N. E. Rep. 824; Hiles v. Fisher, 144 N. Y. 306, 39 N. E. Rep. 337.

estate, as could the husband any interest he might have.¹ Some stress seems to be placed upon the fact that the wife can now contract with reference to her property just as the husband can with reference to his. But the husband could contract with reference to his property at common law when the doctrine of entirety was in full force thereunder, which, of course, he may still do. But the fact that the wife may also do so seems to be of little force in sustaining the theory that the husband may now destroy the entirety of the estate by contracting away his rights by mortgage or otherwise, whereby he transforms the estate into one in common between the transferee or purchaser and the wife, the wife taking the full estate on the death of the husband, the purchaser taking the same at the death of the wife if the husband should survive. Now, if the husband can thus change the estate since the law enabling married women to make contracts, it is strange that he could not do so at common law, or that he can do more now than he could then; and he has really less rights, for the wife, during life, may enjoy the rents and profits of the estate jointly and in entirety with him. Yet the courts permit the husband to do more than he could at common law, when he has, in point of fact, less power and dominion over the estate than then. It is difficult to conceive how this estate, by an act of the husband, can be converted into a tenancy in common; for by this kind of tenure the tenants "are deemed to have several and distinct freeholds, for that circumstance is a leading characteristic of tenancy in common. Each tenant is considered to be solely or severally seized of his share."²

Again, the law is well settled that tenants by the entirety cannot have partition of the joint property, but tenants in common may.³ But certainly it would not be contended that the husband, by alienating or incumbering his interest in the estate, could authorize his vendee to do that which he could not himself accomplish, for this would be a palpable inconsistency, as both reason and authority proclaim.⁴ And upon this prin-

¹ *Branch v. Polk*, 61 Ark. 388, 33 S. W. Rep. 424. *Davis v. Clark*, 26 Ind. 424; *Jackson v. Stephens*, 16 Johns. 110; *Chandler v. Cheney*, 37 Ind. 397; *Thomas v. De Baum*, 14 N. J. Eq. 37; *Back v. Andrew*, 2 Vern. 120.

² 4 Kent, Comm. 368, 369.

³ 4 Kent, Comm. 369, 371.

⁴ *French v. Mehan*, 56 Pa. St. 286; *Andrew*, 2 Vern. 120.

ciple it is held, with unanswerable reasoning, that the interest of one tenant by the entirety cannot be sold under an execution against another.¹ And this well-sustained rule is analogous to that which denies that an expectancy is such that a lien or similar right can be fixed thereupon.² The wife has an estate by dower in the lands of her husband, which is usually an undivided third, and this cannot be aliened by her until the death of the husband and allotment of her portion to her. This is acknowledged to be true in the jurisdictions where the legislature has practically freed the wife from all common-law restraints. At common law the husband was liable for the ante-nuptial debts of the wife. In Arkansas, as in New York and most of the other states, the wife is relieved of nearly or practically all the disabilities of coverture. She may sue and be sued; may own, manage and control her separate business of any kind; may even hire her husband to work on her farm, or at other service, and at as small a salary as his needy circumstances may compel him to take, in order that he may support her and furnish the necessaries of life for himself and family in keeping with her station and dignity in life; she may give the rents of her realty or other property to feed the poor or for other purposes, and require at the hands of the law that her husband, in turn, feed her; she may, before marriage, buy large quantities of land, and, upon coming into this blissful state, require her beneficent and patient husband to foot the bill; she may then sell the same and thereby cut off his contingent right of curtesy, all the while keeping him busy supporting and tenderly caring for her many wants; she may, likewise, buy up any amount of personalty, no part of which her husband, upon marriage, may now take, though he is entitled, in the eye of the law, to the privilege of paying the ante-nuptial debts for this property. It may take all the resources of the generous husband to pay these amounts, and it may leave him alone and penniless in the world from a financial standpoint, but this is no concern of the law, and need be

¹ Davis v. Clark, 26 Ind. 424; Patton v. Rankin, 68 Ind. 245; Vinton v. Beamer, 55 Mich. 559, 22 N. W. Rep. 40; Shinn v. Shinn, 42 Kan. 1, 21 Pac. Rep. 813. Thomas v. De Baum, 14 N. J. Eq. 37, 40; McCurdy v. Canning, 64 Pa. St. 39; Jackson v. McConnell, 19 Wend. 175; Smith v. Whitfield, 67 Tex. 184, 2 S. W. Rep. 822.

² Chandler v. Cheney, 87 Ind. 391;

none of the wife. He is liable for her ante-nuptial debts, and has no way of avoiding the liability however he might wish to do so. This is conceded by the learned Arkansas court.¹ It is not every slight encroachment upon the common law that authorizes the uprooting of common-law precedents or rights. If this were true there would be but little reason for still holding the husband liable for the ante-nuptial debts of the wife. The seemingly morbid inclination on the part of modern legislatures to completely divorce the husband and wife as to property rights, and incidentally as to other rights, perhaps is to be regretted more or less. These radical innovations upon the rules of property, and the incident rights of both husband and wife as they have stood for centuries, may serve a good end and may not. That they bring about uncertainty, confusion and complication as to the status of the property rights of husband and wife, especially in view of the fact that it is rarely the case that any two legislatures make precisely the same change, is matter of every-day observation. The motive is no doubt good. The effect of such changes may not be so wholesome when it comes to their practical application. If the common-law ideas in this respect could be called extreme, it would certainly seem to the thoughtful lawyer that we are rapidly drifting to another and perhaps more dangerous extreme.

§ 187. Conveyance to husband and wife jointly — Tenancy in common.— A conveyance of land to husband and wife jointly without any words of limitation or restriction will always create an estate by entirety at common law. In order, therefore, that a title be made to husband and wife as tenants in common, it is required that the instrument conveying the property to them expressly state that they are to take as tenants in common.² It has indeed been held that husband and wife could not take as tenants in common under the common law, even when the instrument conveying the title by express terms made the estate a tenancy in common.³ But the better rule seems to be the other way.

¹ *Kies v. Young*, 64 Ark. 381, 42 S. W. Rep. 669.

² *Buttlar v. Rosenblath*, 42 N. J. Eq. 651, 9 Atl. Rep. 695; *Tindell v. Tindell* (Tenn. Ch.), 37 S. W. Rep. 1105, 1107.

³ *Dias v. Glover*, Hoff. Ch. (N. Y.) 71; *Stuckey v. Keefes' Ex'rs*, 26 Pa. St. 397.

There seems no good reason to forbid a grantor to convey such an estate as he may please, even to husband and wife, where he expressly stipulates in the deed what particular estate is meant to be conveyed by apt words which preclude any idea to the contrary.¹ Where the husband and wife hold by moieties before they are married, their subsequent marriage will not convert this tenancy in common to one by entirety; for in such a case there could have been no intention on the part of the grantor that they thus take, as the necessary legal effect of the conveyance would be otherwise.² And it has been held that where lands descend to husband and wife as heirs at law, they take by moieties and not by entirety;³ for then there is really no grant. They take by operation of law as heirs and not as husband and wife.

§ 188. Estate by entirety — Effect of divorce.— Whether or not a divorce separating absolutely husband and wife will have the effect of destroying an estate by the entirety existing before the granting thereof is a question of some difficulty, both upon principle and precedent. Upon principle, one of the cardinal requisites to an estate of this kind is, of course, a valid marriage. The estate does not exist in any but husband and wife. After a divorce *a vinculo matrimonii* the parties are not husband and wife. In order, then, that the estate by entirety may exist in those only who are husband and wife, it would seem to follow, from one standpoint, that it cannot have an existence longer than the marriage, by virtue of which it first receives life. On the other hand, when the estate vests in husband and wife their rights become fixed. Neither can convey except the other join. The interests of neither can be sold to pay the liabilities of the other. The whole goes to the one

¹ Stewart v. Patrick, 68 N. Y. 450; E. Rep. 24; Wilken v. Young, 144 Ind. McDermott v. French, 15 N. J. Eq. 78; 1, 41 N. E. Rep. 68.

Tindell v. Tindell (Tenn. Ch.), 37 S. W. Rep. 1105; Hicks v. Cochran, 4 Edw. Ch. (N. Y.) 107; Fulper v. Fulper, 54 N. J. Eq. 531, 34 Atl. Rep. 1063; Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. Rep. 695; Hunt v. Blackburn, 128 U. S. 464, 9 Sup. Ct. Rep. 125; Cloos v. Cloos, 8 N. Y. S. 660. And see Miner v. Brown, 133 N. Y. 308, 31 N. E. Rep. 24; Wilken v. Young, 144 Ind. 1, 41 N. E. Rep. 68.

² Blackborne v. Greaves, 2 Lev. 107; Tindell v. Tindell (Tenn. Ch.), 37 S. W. Rep. 1105; Fulper v. Fulper, 54 N. J. Eq. 531, 34 Atl. Rep. 1063; 4 Kent, Comm. 363.

³ Brown v. Baraboo, 99 Wis. 151, 62 N. W. Rep. 922; Knapp v. Windsor, 6 Cush. (Mass.) 157.

upon the death of the other, all by virtue of the fact that the parties were husband and wife when the grant was made. By such a transaction the character of the realty and the tenure of both the parties are fixed by law. In order, therefore, that a divorce may have the effect of making the interest of either subject to sale under execution after a divorce, it must necessarily follow that the force which brings about this state of things must also bring about a power in either to dispose of his or her interest by grant, for no property can be taken under execution of which the owner could not divest himself. If, therefore, A. and B. are joint tenants and an execution is levied upon the interest of A., which is sold thereunder, what does the purchaser get? Certainly he cannot get a greater estate under the execution than A. could convey at the time of the sale. And certainly, too, the purchaser will not become a joint tenant with B. with right of survivorship, for a joint tenancy must be created at the same time, in the same persons, and by the same act and purchase. If one of two or more joint tenants loses his interest by any act or omission, the jointure ceases.¹ If the purchaser should, by this act, become a joint tenant, the estate would vest entirely in him upon the death of B.; and if a sale under execution would have the same effect as an alienation of A.'s interest by him, then the purchaser would become a tenant in common with B., and each thereafter would be entitled to an undivided one-half interest.²

Generally speaking, whatever a man may alienate may be seized upon execution and applied to the payment of his debts. But a husband or wife cannot alien any part of an estate by entirety so as to make the grantee a tenant in common with the other, though a sale by one tenant in common of his interest would have the effect of making the vendee a tenant in common with the other. In tenancies by the entirety, not even the attainder of the husband affects the right of the wife should she survive him.³ And lands held by entirety cannot be divided in partition.⁴ But realty held in joint tenancy may, whereby a material distinction is made.⁵ It will thus be seen that there

¹ 2 Bl. Comm. 184; 4 Kent, Comm. 363.

² 4 Kent, Comm. 363.

³ 4 Kent, Comm. 362.

⁴ Thornton v. Thornton, 3 Rand. (Va.) 179; 4 Kent, Comm. 362, 363.

⁵ 4 Kent, Comm. 364.

are some material differences between estates held in joint tenancy and those held by entirety, though there is one feature common to both, and that is survivorship. There are no features of either dower or curtesy in the estate by the entirety, and, for this reason, the fact that both dower and curtesy are destroyed by a divorce *a vinculo* does not necessarily bear in favor of the theory that the estate by entirety must cease when the marriage thus ceases. It may be well enough to look to the origin of the idea of a tenancy by the entirety to find light to guide in a search for the correct rule. This idea was grounded upon the absolute unity of the husband and wife as viewed at common rule. "They twain were one flesh" in a very comprehensive and strict sense under this ancient law. It was not the purpose that the property should descend to the heirs of either, except that such heirs might succeed to the inheritance by reason of the survivorship of their parent. The object was to vest the estate in both husband and wife inseparably, after the idea of the indissoluble qualities of the marital estate itself. These and other considerations incident to the marriage relation naturally tend to support the theory that the estate by entirety is to be kept so until one survive the other, at which time the title to the whole would become complete in the survivor, when, of course, it might be resorted to by the creditors of the survivor or others having a right of action. The supreme court of Illinois have held that a decree of divorce effected a dissolution of the marriage contract, and, necessarily, a change of the nature of a tenancy by entirety into a tenancy in common, by reason of which the wife became entitled to a partition of the lands held formerly by entirety.¹ In a comparatively recent Michigan case, it is held that a divorce does not destroy a tenancy by entirety, and that the survivor takes the whole estate, even after a decree annulling the marriage.² This latter ruling seems more proper, for, were it otherwise, the husband or wife could change an estate by entirety by making the condition of the other so intolerable as to necessitate proceedings for a divorce, and by this means a tenancy by entirety could be by such contract turned into one in common, when even

¹ *Harrer v. Wallner*, 80 Ill. 197.

Lash, 58 Ind. 526; *Ames v. Norman*,

² *Appeal of Lewis*, 85 Mich. 340, 48

4 *Sneed* (Tenn.), 696.

N. W. Rep. 580. And see *Lash v.*

the party at fault, as well as the other party, of course, might then dispose of his part of the estate now held in common instead of by entirety, as at first. The rights of the heirs of the respective parties would also be changed, as the heirs of tenants in common succeed to the undivided half belonging to their ancestor and undisposed of at his or her death.

§ 189. Estate by entirety — Execution.— There is a want of harmony among the authorities as to whether the interest of one of the parties holding an estate by entirety is subject to execution before the death of the other. The Tennessee court has held that, after a husband and wife have been divorced, the interests of the husband may be seized and sold under execution against him before the death of the wife, and that the effect of such a sale will be to make the purchaser and other tenant by the entirety joint tenants for life, subject to the survivorship.¹ But the better opinion seems to be that, as the estate is a peculiarly joint one, differing from both a tenancy in common and a joint tenancy, it is not such an estate as is subject to a judgment or execution lien.² Growing crops raised upon the land by entirety are a part of the realty, and not subject to sale under execution to satisfy the debts of the husband.³ It is held sometimes under the common law that the interest of the husband in the estate held by entirety may be sold under execution against him, but such a sale can only give the purchaser, in any event, an interest in the land subject to defeasance in the event of the survival of the wife.⁴ And it is held in this state that if the husband should survive the wife, a previous sale under execution against him would vest the whole estate in the purchaser.⁵

§ 190. Right of wife to appoint attorney in fact.— The wife cannot authorize another by warrant of attorney to confess or authorize a judgment against her. In the first place she

¹ Ames v. Norman, 4 Sneed (Tenn.), 683.

² Vinton v. Beamer, 55 Mich. 559, 22 N. W. Rep. 40; Davis v. Clark, 26 Ind. 424; Patton v. Rankin, 68 Ind. 245; McCurdy v. Canning, 64 Pa. St. 89; Thomas v. De Baum, 14 N. J. Eq. 37, 40; Jackson v. McConnell, 19

Wend. 175; Simpson v. Biffle, 63 Ark. 289, 38 S. W. Rep. 345; Jones v. Chandler, 40 Ind. 588; Hulett v. Inlow, 57 Ind. 412.

³ Patton v. Rankin, 68 Ind. 245.

⁴ Ames v. Norman, 4 Sneed (Tenn.), 683; Bennett v. Child, 19 Wis. 362.

⁵ Bennett v. Child, 19 Wis. 362.

cannot sue or be sued at common law unless her husband join or be joined with her as a party plaintiff or defendant. And as she cannot be sued alone, it necessarily follows that she cannot confess judgment against herself. She therefore cannot authorize another to do so by power of attorney or otherwise, for she can delegate no greater authority than she has.¹ So, if the wife nevertheless execute a warrant of attorney authorizing a confession of judgment, the judgment entered by virtue of such warrant, or an execution or other process under same, will be void.² If the warrant of attorney authorizing the confession of judgment be executed by both husband and wife, it will be valid as to the husband and void as to the wife.³ This is true though it is provided by statute that a married woman may bind herself by a written instrument executed jointly with her husband.⁴

§ 191. Power of wife to execute deed — Common-law rule. Under the common law the civil existence of the wife became swallowed up, as it were, by her marriage, into that of her husband, and the two thereafter became one person in law. And it was not permitted that the wife execute a deed, bond or other like instrument or obligation. This was nothing less than a contract, and her coverture forbade it.⁵ And when such an instrument is executed, a plea of coverture in an action thereon is always effective to defeat it.⁶ If, however, a *feme sole* be sued on her individual bond or other liability, and she be unmarried at the time of the commencement of the action, she cannot defeat it by subsequently and before trial marrying and then pleading her coverture.⁷ In such cases the wife may appear and plead by her attorney without her husband.⁸ For her liability has reference to the time the action was instituted, and when this was done she was under no disability which would

¹ Candell v. Shaw, 4 T. R. 361; Knox v. Flack, 22 Pa. St. 337; Dorrance v. Scott, 3 Whart. (Pa.) 309; Caldwell v. Walters, 18 Pa. St. 79.

² Dorrance v. Scott, 3 Whart. (Pa.) 309.

³ Caldwell v. Walters, 18 Pa. St. 79.

⁴ Duckett v. Jenkins, 66 Md. 267, 7 Atl. Rep. 263.

⁵ Lambert v. Atkins, 2 Camp. N. P.

272; Dorrance v. Scott, 3 Whart. (Pa.) 309; Anonymous, 6 Mod. 230; Anonymous, 12 Mod. 609; Schrader v. Decker, 9 Pa. St. 14; 2 Kent, Comm.

150; Cole v. Van Riper, 44 Ill. 58, 66.

⁶ Lambert v. Atkins, 2 Camp. N. P. 272; Anonymous, 6 Mod. 230; Anonymous, 12 Mod. 609.

⁷ King v. Jones, 2 Str. 811.

⁸ King v. Jones, 2 Raym. 1525.

prevent a valid judgment being rendered against her. The judgment relates back, in a sense, to the time of the commencement of the action and is therefore effective.

§ 192. Mode of conveyance by wife under the English rule. Under the old law of England the title of the wife during coverture had to be passed by some proceeding in a court of record. This proceeding was by fine or common recovery.¹ In this country, when a wife is authorized to convey at all, the authority is found in some statute which provides a mode materially different from the ancient rule. Her conveyances at this day are usually effective, subject to certain prescribed restrictions and formalities, by her own act.

§ 193. Power of wife to convey — American rule.— In this country the mode of conveyance by a wife of any interest she may have in realty is generally provided by statutes on the subject. As to her dower interest, she is generally required to join in a deed by the husband to the lands, and therein relinquish, in a form and manner required by statute, her dower right, and this is also supplemented with requirements as to acknowledgment, either private or otherwise.² Of course, the joining in a deed which the husband executes will amount to his consent for his wife to convey, when this is required. And at common law, under the mode of alienation by fine and recovery, the curtesy interest of the husband in the lands of the wife could not be defeated, unless the husband joined in the proceedings.³ And at the present day statutes will generally be found authorizing the wife to convey her individual realty without the consent of the husband, and without joining in the conveyance with him or he in the conveyance with her.⁴ Where the wife is authorized to convey her

¹ 2 Kent, Comm. 150; *Cole v. Van Riper*, 44 Ill. 58, 66; *Martin v. Dwelly*, 6 Wend. 9; *Butler v. Buckingham*, 5 Day (Conn.), 492, 504.

² *Cole v. Van Riper*, 44 Ill. 58, 66. See, too, *American Freehold Land Mtg. Co. v. Thornton*, 108 Ala. 258, 19 S. Rep. 529. And of course it will usually, if not always, be prudent to consult the local statutes on the subject,

by which conveyances of this kind are regulated.

³ 2 Kent, Comm. 150; *Cole v. Van Riper*, 44 Ill. 58, 60. And see, too, *Swanton v. Raven*, 3 Atk. 105.

⁴ *Small v. Field*, 102 Mo. 120, 14 S. W. Rep. 815; *Owings v. Wiggins*, 133 Mo. 630, 34 S. W. Rep. 877; *Harris v. Spencer* (Conn.), 41 Atl. Rep. 773.

realty or other property without the consent of her husband, or his joining in the act of conveyance, she can, of course, mortgage or otherwise incumber it without him.¹ When the statutes provide a mode in which a married woman may convey her realty, the requirements must at least be substantially followed; otherwise the conveyance cannot be effective, for the common law cannot be resorted to to uphold it.² A married woman, therefore, cannot be compelled to specifically perform a contract to convey, evidenced by a deed or contract which is void because of a non-compliance with the requirements of the statute enabling a married woman to convey.³ The rule as to these matters is the same at law and in equity.⁴ Nor is a married woman estopped to set up the invalidity of her conveyance in such cases, for there can be no estoppel by contract unless there be with it a power to contract.⁵ Where the statute requires that there should be a private examination of the wife, the deed will not be valid unless this requirement be followed.⁶ And if the statute requires that the husband consent to the conveyance, this will be requisite to the validity of the act, and the consent must be affirmatively given.⁷

§ 194. Power of attorney to convey land executed by wife—Effect.—It is generally held that a married woman cannot convey her lands through the medium of a power of attorney executed to another for the purpose of effecting the conveyance, whether the power be executed to the husband or a stranger. This, of course, would be the unbending rule at common law, but it is also the generally-accepted doctrine where the wife might herself convey her property. The statutes authorizing her to dispose of her realty seem to be construed strictly, and as she is not expressly empowered by statute

¹ *Owings v. Wiggins*, 133 Mo. 630, 34 S. E. Rep. 877; *Rigby v. Logan*, 45 S. C. 651, 24 S. E. Rep. 56.

² *Brown v. Pechman* (S. C.), 30 S. E. Rep. 586; *Davis v. Bowman* (Tenn. Ch.), 46 S. W. Rep. 1039; *Green v. Bennett*, 120 N. C. 394, 27 S. E. Rep. 142. And *vide* *Hall v. Walker*, 118 N. C. 377, 24 S. E. Rep. 6.

³ *Brown v. Pechman* (S. C.), 30 S. E. Rep. 586.

⁴ *Brown v. Pechman* (S. C.), 30 S. E. Rep. 586.

⁵ *Brown v. Pechman* (S. C.), 30 S. E. Rep. 586.

⁶ *Davis v. Bowman* (Tenn. Ch. App.), 46 S. W. Rep. 1039; *Peterson v. Carson* (Tenn. Ch. App.), 48 S. W. Rep. 388.

⁷ *Slocumb v. Ray* (N. C.), 31 S. E. Rep. 829.

to alien her separate property through the medium of another, but only by her own direct act, it is held that she must convey directly and individually.¹ One of the reasons assigned for this rule of law is, that the wife is usually required to make some private acknowledgment of the execution of all conveyances affecting her interest in real property as a condition precedent to the validity of same, and that the authority to undergo this private examination cannot be delegated to another.² But it is not always the case that a private examination of the wife is required, especially with reference to her individual, separate property. And when this is not required there would seem to be little purpose which the rule could serve except to preserve a fiction.³ In Kansas and elsewhere a married woman may vest in her husband authority to convey for her by power of attorney.⁴

§ 195. Purchase of land by husband with wife's money — Resulting trust.— If a wife gives to her husband money with which to buy land for her, and he, contrary to her wishes and instructions, buys the same and takes the title in his own name, or if, acting for her in any capacity, he buys property in his own name with her funds, he will be charged in equity as a trustee for her.⁵ But in order that the wife have an equity in

¹ *Halbert v. Hendrix* (Tex. Civ. App.), 26 S. W. Rep. 911; *Duckett v. Jenkins*, 68 Md. 267, 7 Atl. Rep. 263; *Peak v. Brinson*, 71 Tex. 316, 11 S. W. Rep. 269; *Cardwell v. Rogers*, 76 Tex. 37, 12 S. W. Rep. 1006; *Mott v. Smith*, 16 Cal. 533; *Holland v. Moon*, 39 Ark. 120; *Partee v. Thomas*, 11 Fed. Rep. 769; *Chaison v. Beauchamp*, 12 Tex. Civ. App. 109, 34 S. W. Rep. 303.

² *Mott v. Smith*, 16 Cal. 533; *Holland v. Moon*, 39 Ark. 120.

³ The absurdity of adhering to this rule when the reason for it no longer exists has prompted the Arkansas legislature to enact that "it shall be lawful for married women to make executory contracts and to execute letters of attorney, which shall have the same force and effect as those made by unmarried persons." Acts Ark.,

1895, p. 58; and see *Christmas v. Hahn* (Ky.), 9 S. W. Rep. 279.

⁴ *Munger v. Baldrige*, 41 Kan. 236, 21 Pac. Rep. 158; *Richmond v. Voorhees*, 10 Wash. 316, 38 Pac. Rep. 1014.

⁵ *Warren v. Jones*, 68 Ala. 449; *Jones v. Elkins* (Mo.), 45 S. W. Rep. 261; *Mitchell v. Colglazier*, 106 Ind. 464, 7 N. E. Rep. 199; *Vincent v. State*, 74 Ala. 274; *Broughton v. Brand*, 94 Mo. 169, 7 S. W. Rep. 119; *Beitman v. Hopkins*, 109 Ind. 177, 9 N. E. Rep. 720; *Sale et ux. v. McLean et al.*, 29 Ark. 612; *Cleghorn v. Obernalte* (Neb.), 74 N. W. Rep. 62; *Mosher v. Neff*, 33 Neb. 770, 51 N. W. Rep. 138; *Hews v. Kenney*, 43 Neb. 815, 62 N. W. Rep. 204; *Heath v. Slocum*, 115 Pa. St. 549, 9 Atl. Rep. 259; *Beddow v. Sheppard* (Ala.), 23 S. Rep. 662; *Boynton v. Miller* (Mo.), 46 S. W. Rep.

land for which her money has been applied in payment, the payment of the money for the land must be made at the time of purchase or previously. If the husband buy the land upon his own credit, and afterwards pay off the indebtedness with the wife's money, no trust arises in her favor.¹ Further, it must be clearly shown that the funds with which the property was purchased belonged to the wife.² The fact that the husband has as much or more money in his hands belonging to his wife as was paid for the property is not sufficient to establish the fact that the wife's money went to pay for the property or to impress it with a resulting trust in her favor.³ In short, evidence to establish a resulting trust as between husband and wife must be received with caution, as it seeks to overturn all presumptions and the apparent facts.⁴

§ 196. Right of wife to an equity out of the estate which the husband takes upon the marriage.—Courts of equity from very early times, in order to prevent the wife and children being brought to a state of want, adopted the practice of assuring to the wife a reasonable provision out of the property which vested in the husband upon the marriage. This was called the wife's equity, and was given her because the husband by virtue of the marriage took all the real estate of his wife of which she was, at the time of the marriage or subsequently, seized of an estate of inheritance, and which he held in right of the wife, as well as being vested with the absolute ownership and title to her personal property reduced to possession during the coverture; and all the personal property which he gets by the marriage passes upon his death to his legal representatives and not to the wife, and the property which he thus takes becomes subject to the payment of all his debts.⁵

754; *In re Anderson*, 23 Fed. Rep. 482; *English v. Law*, 27 Kan. 242; *Berry v. Wiedman*, 40 W. Va. 36, 20 S. E. Rep. 817. See also *Boyd v. McLean*, 1 Johns Ch. 582; *Latham v. Latham*, 98 Ga. 477, 25 S. E. Rep. 505; *Smith v. Willard* (Ill.), 51 N. E. Rep. 835; *Voorhees v. Blanton*, 89 Fed. Rep. 885.

¹ *Sale v. McLean*, 29 Ark. 612, 630.

² *Keith v. Miller*, 174 Ill. 64, 51 N. E. Rep. 151; *Mahoney v. Mahoney*, 65

Ill. 406; *Corder v. Corder*, 124 Ill. 229, 16 N. E. Rep. 107; *Vincent v. State*, 74 Ala. 274.

³ *Keith v. Miller*, 174 Ill. 64, 51 N. E. Rep. 151.

⁴ *Corder v. Corder*, 124 Ill. 229, 16 N. E. Rep. 107.

⁵ *Ellibank v. Montolien*, 5 Ves. 773; *Barron v. Barron*, 24 Vt. 375, 391; *Jewson v. Maulson*, 2 Atk. 417; *Udell v. Kenney*, 3 Cowen, 590; *Howard v.*

And the claim could be actively asserted by the wife against the creditors of her husband whenever the financial condition of the husband endangered the absorption of his property by them;¹ nor could the husband dispose of this equity of the wife to her prejudice without first making a suitable provision out of his property for her support.² And the wife cannot consent to such disposition if she be an infant;³ though if she be *sui juris* she can release her equity.⁴

§ 197. Right of wife to bind separate property for debts of her husband or others.—The modification of the common law which empowers a wife to contract with reference to her separate estate regardless of her husband to the same effect that an unmarried person might do, gives her the authority and power to mortgage, pledge or otherwise incumber it.⁵ Further than this, it is generally held under statutes authorizing the wife to own, acquire and sell property, and manage, control and dispose of the same as a *feme sole* might do, that she may sell, convey, bind, pledge or incumber it for the purpose of securing the debts of her husband or those of a stranger, as this could be done by a single person beyond question.⁶ She

Moffatt, 2 Johns. Ch. 206; *Ex parte* Bresford, 1 Desaus. (S. C. Eq.) 263; *Wright v. Morley*, 11 Ves. 12.

¹ *Barron v. Barron*, 24 Vt. 375, 391; *Ellibank v. Montolien*, 5 Ves. 737.

² *Udell v. Kenney*, 3 Cowen, 590.

³ *Udell v. Kenney*, 3 Cowen, 590.

⁴ *Helms v. Franciscus*, 2 Bland Ch. 544, 581.

⁵ *Henry v. Blackburn*, 32 Ark. 445; *Chollar v. Temple*, 39 Ark. 238; *Walker v. Jessup*, 43 Ark. 163; *Hoffman v. McFadden*, 56 Ark. 217, 19 S. W. Rep. 753; *Avery v. Popper* (Tex. Civ. App.), 45 S. W. Rep. 951; *Magel v. Milligan* (Ind.), 50 N. E. Rep. 565; *Dzialynski v. Bank*, 23 Fla. 346; *Ballard v. Lippman*, 32 Fla. 481, 14 S. Rep. 154; *Thomson v. Kyle* (Fla.), 23 S. Rep. 12; *Linton v. Cooper* (Neb.), 73 N. W. Rep. 734; *Warren v. Freeman*, 85 Tenn. 513, 3 S. W. Rep. 513.

⁶ *Collins v. Wassell*, 34 Ark. 17; *Nelms v. Keller* (Ga.), 30 S. E. Rep.

572; *Kaiser v. Stickney*, 102 U. S. 176; *Damon v. Deeves*, 57 Mich. 247, 23 N. W. Rep. 798; *Warwick v. Lawrence*, 43 N. J. Eq. 179, 10 Atl. Rep. 376; *Booker v. Wingo*, 29 S. C. 116, 7 S. E. Rep. 49; *Scott v. Ward*, 35 Ark. 480; *Nichol v. Hays* (Ind.), 50 N. E. Rep. 768; *Hughes v. Farmers' Savings & Bldg. & Loan Ass'n* (Tenn.), 46 S. W. Rep. 362; *Savings Bank v. Daley* (Cal.), 53 Pac. Rep. 420; *Allen v. O'Donald*, 28 Fed. Rep. 17; *Buffalo Co. Bank v. Sharpe*, 40 Neb. 123, 58 N. W. Rep. 734; *Stephenson v. Craig*, 12 Neb. 464, 12 N. W. Rep. 1; *Fireman's Ins. Co. v. Bay*, 4 Barb. 407; *Watts v. Gantt*, 42 Neb. 869, 61 N. W. Rep. 104; *Kloke v. Martin* (Neb.), 76 N. W. Rep. 168; *Briggs v. First Nat. Bank*, 41 Neb. 17, 59 N. W. Rep. 851; *Philpot v. Cantey* (S. C.), 30 S. E. Rep. 595; *Holmes v. Hull*, 50 Neb. 656, 70 N. W. Rep. 241; *Stafford Savings Bank v. Underwood*, 54 Conn. 2, 4 Atl. Rep.

may do this even though she receive no consideration whatever from the husband or stranger whose debt she thus secures with her separate estate.¹ A consideration received by the husband or stranger whom she thus accommodates will be sufficient for all purposes.² But if there should be no consideration moving to either the wife or the person whom she thus accommodates, no doubt she could plead this in defense of an action against her, as a contract is not binding upon any one where there is no consideration moving to either principal or surety. If the wife should execute a mortgage or other conveyance of her property to secure a debt of her husband under duress or by virtue of over-persuasion amounting to undue or improper influence, it would be void if thus improperly caused by the husband or the creditor; but if neither was party or privy to such improper persuasion or fear, the transaction would be valid, as the creditor is not chargeable with acts of strangers done without his sanction or knowledge.³

§ 198. Separate property of wife — Incumbrance by way of improvements.—It naturally occurs in the course of events that a necessity arises to improve and repair the separate property of a married woman, just as in the case of property belonging to one under no disability like coverture. It is proper and businesslike for a married woman to keep her property in repair and improve it from time to time as may appear to be profitable and expedient. This being true, a married woman, under statutes authorizing her to deal with her separate property as a single person, may contract for improvements and

248; *McAlarney v. Paine* (Pa.), 10 Atl. Rep. 20; *Burtis v. Wait*, 33 Kan. 478, 6 Pac. Rep. 783; *Hitz v. Jenks*, 123 U. S. 297, 8 Sup. Ct. Rep. 143; *Johnson v. Ward*, 82 Ala. 486, 2 S. Rep. 524; *Patapsco Guano Co. v. Hurst* (Ga.), 32 S. E. Rep. 136; *Appeal of Gable* (Pa.), 7 Atl. Rep. 52; *Conway v. Wilson* (N. J. Eq.), 11 Atl. Rep. 607. And see *Taylor v. American Freehold L. M. Co.* (Ga.), 32 S. E. Rep. 153; *Pritchett v. McGaughey* (Ind.), 52 N. E. Rep. 396.

¹ *Hubbard v. Sayre*, 105 Ala. 440,

17 S. Rep. 17; *Gillespie v. Smith*, 20 Neb. 455, 30 N. W. Rep. 526; *Briggs v. First Nat. Bank*, 41 Neb. 17, 59 N. W. Rep. 351; *Holmes v. Hull*, 50 Neb. 656, 70 N. W. Rep. 241; *Kieldsen v. Blodgett* (Mich.), 72 N. W. Rep. 9.

² *Kieldsen v. Blodgett* (Mich.), 72 N. W. Rep. 9; *Lomerson v. Johnson*, 44 N. J. Eq. 93, 13 Atl. Rep. 8.

³ *Kauffman v. Rowan* (Pa.), 42 Atl. Rep. 25; *Williams v. Farmers' & Drovers' Bank* (Ky.), 49 S. W. Rep. 183.

repairs upon her separate property and bind the same by a statutory lien for material furnished and labor expended for this purpose.¹ But the material must, generally, be suitable and proper for the repairs or improvement, and must be furnished upon a contract with the wife or some other person for her duly authorized to make contracts on her behalf.² The husband, therefore, cannot bind the estate of his wife by making a contract in her name for the improvement of her property so as to either bind her or her property, unless he is first by her duly authorized to act for her.³ And there is no presumption of agency or authority in the husband to thus bind his wife or her estate merely from the existence of the marital relation itself.⁴ Of course a married woman might so conduct herself towards persons dealing with her husband as her agent as to be estopped from denying that he had authority so to act. This will usually be the case when her husband is so acting with her knowledge, and the persons with whom he is dealing rely upon the belief that he is her agent with authority to bind her. Because, by such conduct, she would lead them to do an act to their injury were they not allowed to invoke the doctrine of estoppel.⁵ And she and her property are liable under the mechanics' lien law when the contract for the improvement or repairs is entered into jointly by herself and husband with the mechanic.⁶ When properly authorized, the husband may, of

¹ *Hauptman v. Catlin*, 20 N. Y. 247, 248; *Fowler v. Seaman*, 40 N. Y. 592; *Hitchcock v. Kiely*, 41 Conn. 611; *Husted v. Mathes*, 77 N. Y. 388; *Bliss v. Patten*, 5 R. L. 376; *Edwards v. Edwards*, 24 Ohio St. 402; *Tucker v. Guest*, 46 Mo. 339; *Burgwald v. Weipert*, 49 Mo. 60; *Carpenter v. Leonard*, 5 Minn. 155; *Vail v. Myer*, 71 Ind. 159; *Greenough v. Wigginton*, 2 Greene (Iowa), 435; *Kidd v. Wilson*, 23 Iowa, 464; *Cashman v. Henry*, 75 N. Y. 103; *Murray v. Keyes*, 35 Pa. St. 384; *Lippincott v. Leeds*, 77 Pa. St. 420; *Miller v. Mead*, 127 N. Y. 544, 28 N. E. Rep. 387; *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538, 36 Atl. Rep. 1003. And see *Jacques v. Methodist Episcopal Church*, 17 Johns. 548; *Inter-State B.*

& L. Ass'n v. Ayers (Ill.), 52 N. E. Rep. 342.

² *Shannon v. Shultz*, 87 Pa. St. 481; *Thompson v. Shepard*, 85 Ind. 352.

³ *Hoffman v. McFadden*, 56 Ark. 217, 19 S. W. Rep. 753; *Young v. Swan*, 100 Iowa, 323, 69 N. W. Rep. 566.

⁴ *Conway v. Crook*, 66 Md. 291, 7 Atl. Rep. 402; *Planing Mill Co. v. Brundage*, 25 Mo. App. 268; *Gilman v. Disbrow*, 45 Conn. 563; *Knott v. Carpenter*, 3 Head (Tenn.), 542; *Hoffman v. McFadden*, 56 Ark. 217, 19 S. W. Rep. 753; *Garnett v. Berry*, 3 Mo. App. 197.

⁵ *Hoffman v. McFadden*, 56 Ark. 217, 19 S. W. Rep. 753. And see *Thompson v. Shepard*, 85 Ind. 352.

⁶ *Greenough v. Wigginton*, 2 Greene (Iowa), 435.

course, bind the property of his wife for improvements and repairs and thereby establish a valid mechanic's lien.¹ For, as a rule, a person can do everything through the agency of another which he may do himself.

§ 199. Wife's property — Possession of husband.— As a general rule, where the husband and wife are living together, the possession by the husband of the property belonging to the wife is regarded in law as that of the wife herself. The same legal rights exist as though the wife were single and had actual separate and exclusive possession and control.² And delivery of the wife's property to her and her husband, or probably to her husband alone, when delivered to him for her, will effect a delivery to the wife.³ The possession by a husband of the property of the wife is presumed to be in amity with her claim. It is therefore properly held that such possession cannot form the basis of a claim by the husband to any property of the wife by adverse possession.⁴ The fact that the husband pays taxes on the property of the wife is not, of itself, sufficient to make his holding adverse.⁵ This presumption, however, ceases upon the rendition of a decree legally divorcing the parties, by reason of which they at once become strangers to each other and stand at arm's-length.⁶ But after the death of the wife the possession of the husband may become hostile so as to ground a claim of adverse possession against those claiming through her.⁷ A husband in possession of land as a joint tenant or part owner with his wife will not be permitted to suffer the land to be sold and buy it at the tax sale, as his marital status and the character of his possession are inconsistent with such an act on his part.⁸ And under statutes authorizing married women to own and control property, possession by a wife of property conveyed or transferred to her by her husband or

¹ Kidd v. Wilson, 23 Iowa, 464.

² McNeill v. Arnold, 17 Ark. 154; Gordon v. Eans (Mo.), 4 S. W. Rep. 112.

³ McNeill v. Arnold, 22 Ark. 477.

⁴ Ferring v. Fleischman (Tenn. Ch. App.), 39 S. W. Rep. 19; Watt v. Watt (Ky.), 39 S. W. Rep. 48; Reagle v. Reagle, 179 Pa. St. 89, 36 Atl. Rep. 191.

⁵ Reagle v. Reagle, 179 Pa. St. 89, 36 Atl. Rep. 191.

⁶ Ferring v. Fleischman (Tenn. Ch. App.), 39 S. W. Rep. 19.

⁷ Ward v. Nestell (Mich.), 71 N. W. Rep. 593.

⁸ Ward v. Nestell (Mich.), 71 N. W. Rep. 593.

another is not the possession of the husband.¹ On the other hand, the law does not presume that property in possession of the wife belongs to the husband, and certainly should not.²

§ 200. Right of husband to dispose of wife's separate estate.—Where by statute the wife is given a separate estate free from the authority or control of the husband, it is very clear that he can do no act with reference thereto whereby any right or interest of the wife in the property will be affected. He cannot, therefore, sell, incumber or in any way dispose of such separate property of his wife without her consent or authority.³ And the fact that the wife may become aware of the act of the husband in so doing without informing the person dealing with him that she would claim her rights in the property attempted to be conveyed or incumbered by the husband without her authority will not estop her to deny the authority of her husband nor to claim the property from his grantee.⁴ There must be some consideration moving to her before she can even confirm or ratify a disposition of her property by her husband, or an estoppel which would preclude her from insisting on her rights.⁵ Of course, as to the personal property of the wife which the husband took by his marriage and a reduction to possession, this rule does not apply, for that became his absolutely with unlimited power of disposition.⁶

§ 201. Liability of wife's separate property for husband's debts.—The statutes allowing the wife to own, control and dispose of her separate estate usually expressly provide that her ownership and interest therein shall be free from the control or debts of the husband. At any rate, this is the logical conclusion in all cases where by statute the wife is allowed to own property in her own right. This cannot be taken or molested by creditors seeking to realize a debt owing them by

¹Wyatt v. Watt (Oreg.), 49 Pac. Rep. 855.

²German Bank v. Himstedt, 42 Ark. 64.

³McIntosh v. Parker, 82 Ala. 238, 3 S. Rep. 19; Springer v. Young, 14 Oreg. 280, 12 Pac. Rep. 400; Lafargue

v. Markley, 55 Ark. 423, 18 S. W. Rep. 542.

⁴Taylor v. Riley, 37 Kan. 90, 14 Pac. Rep. 476; Lafargue v. Markley, 55 Ark. 423, 18 S. W. Rep. 542.

⁵Lafargue v. Markley, 55 Ark. 423, 18 S. W. Rep. 542.

⁶2 Kent, Comm. 143.

the husband.¹ And where the wife is given her own earnings by law, these, of course, upon like principles, cannot be reached by creditors of her husband.² Should a creditor of the husband, therefore, have an execution or other process levied upon the separate property of the wife, she would have her remedy to regain possession by replevin.³ Or the wife could maintain an action against the officer selling her property, for he must ascertain, at his peril, that the property upon which he levies to satisfy a claim against the husband belongs to him, not to his wife.⁴ And of course she could have a like action against the creditors of the husband who directed the officer to make the levy upon the property belonging to her individually.

§ 202. Conveyance of wife's land to secure debts of husband.—It is and has always been contrary to the policy of the common law for a married woman to sell, convey or incumber her individual property for the purpose of paying or securing the debts of her husband. Indeed, it is not within her power, being under the disability of coverture, to convey or bind her property for this purpose, and if she should attempt to thus bind or dispose of such property, no matter by what form or from what motives, the transaction will be deemed in law an absolute nullity, and her title to the property will remain just as though no attempt to convey it had been made.⁵ This, of course, under the common law, has reference to the realty alone, for, as to the personalty, the husband took the absolute title to that upon the marriage and reduction of same to his possession.

¹ *McDevitt v. Vial* (Pa.), 11 Atl. Rep. 645; *Stratton v. Bailey*, 80 Me. 345, 14 Atl. Rep. 739; *Scott v. Rowland*, 82 Va. 484, 4 S. E. Rep. 595; *Turner v. Short* (Ky.), 7 S. W. Rep. 391; *Callahan v. Powers*, 24 Neb. 731, 40 N. W. Rep. 292; *Rudd v. Peters*, 41 Ark. 177.

² *Shortel v. Young*, 23 Neb. 408, 36 N. W. Rep. 572.

³ *Gutsch v. McIlhargey*, 69 Mich. 877, 37 N. W. Rep. 303; *O'Neill v. Henderson*, 15 Ark. 235.

⁴ *Hamilton v. Ross*, 23 Neb. 630, 37 N. W. Rep. 467.

⁵ *First Nat. Bank v. Bayliss*, 96 Ga. 684, 23 S. E. Rep. 851; *Mickleberry v. O'Neal* (Ga.), 25 S. E. Rep. 932. In Georgia this is the statutory rule as to all the wife's property, real and personal, and a conveyance of the property constituting her separate estate for this purpose, though she could convey it for any other legitimate purpose, is void in this state.

§ 203. When wife may be estopped.—As a rule, all are required to take notice of the coverture of married women and of the rights, privileges and disabilities which the law gives them. It is generally held, therefore, that in order for a married woman to effectively bind herself by an estoppel, the act or conduct must be something more than negative action; that she must do some affirmative thing or act which, if relied upon by the person seeking to establish the estoppel, would result in his injury. And this act or conduct must be such as is effective in law when done by a married woman.¹ And where the wife would not be estopped if alive, her heirs may claim the privileges of her disability in opposition to the theory of estoppel.² She will not be estopped to set up the invalidity of a deed executed by her, for her disabilities with reference to the power of disposal of her property are fixed by law, and no one will be heard to take any advantage of a conveyance by a married woman which the law says she cannot make.³ She cannot enlarge the powers which the law gives her by her own act; nor can she estop herself by attempting to do an act which the law forbids her to do. All must take notice of the limitation of her powers, and none will be heard to complain that they are misled by an act which she cannot legally perform.⁴ This is because all must, at their peril, take notice of all the requirements of law, and they will not be heard to contend that they are ignorant of those things which the law makes it their duty to know.

§ 204. Power of wife to contract generally at common law.—Under the common law the disabilities of coverture were such as to prevent the wife from making any contracts which would be binding upon her individually in a general sense. She could make no contract, while married, which would authorize a judgment against her or her property. Her legal existence was so blended with that of her husband as to make her contracts void and of no force.⁵ As a married woman

¹ McLaren v. Jones, 89 Tex. 131, 33 S. W. Rep. 849; Grandjean v. San Antonio (Tex. Civ. App.), 38 S. W. Rep. 837.

² Williams v. Ellingsworth, 75 Tex. 483, 12 S. W. Rep. 746.

³ Stone v. Sledge, 87 Tex. 49, 26 S. W. Rep. 1068; affirming 24 S. W. Rep. 697.

⁴ Bank of America v. Banks, 101 U. S. 240.

⁵ Rogers v. Phillips, 8 Ark. 366; 2

is not bound by her contracts, she is not, of course, bound by the covenants in her deed at common law.¹ This is true under statutes greatly enlarging the contractual powers of a married woman.² And her contracts being void, they can furnish no basis for a consideration or liability on a contract made after the disability of coverture has been removed.³ A promissory note executed by a married woman, in which nothing is said about her separate property, cannot be enforced against her even where she is, by statute, authorized to contract with reference to her own property.⁴ Nor can the fact that the wife intended to bind her separate property by the execution of such note be proven by parol testimony.⁵ It is only in equity, under the old order of things, that the property of the wife could be reached in order to fix a liability upon it for her obligations; and this could be done in equity only when she had a separate estate. And further, in equity the liability is not personal, but the remedy is only against the property itself.⁶ Under the old order of things there was, as a general rule, no method by which a personal judgment could be obtained against a married woman so long as she remained under the disability of coverture.

§ 205. Power to contract with each other at common law. The idea of the legal unity between husband and wife under the common law has always been firmly maintained. The ex-

Kent, Comm. 150; *Dobbin v. Hubbard*, 17 Ark. 189, 194; *Hydrick v. Burke*, 31 Ark. 124; *Liverpool A. L. Ass'n v. Fairhurst*, 9 Exch. 422; *Eckert v. Reuter*, 33 N. J. Law, 266; *Van Kirk v. Skillman*, 34 N. J. Law, 109; *Condon v. Barr*, 49 N. J. Law, 53, 6 Atl. Rep. 614; 2 Story, Eq. Jur., § 1399; *Bailey v. Pearson*, 29 N. H. 77; *Ames v. Foster*, 42 N. H. 381; *Shannon v. Canney*, 44 N. H. 292; *Penacock Sav. Bank v. Sanborn*, 60 N. H. 558; *Overseers of Montoors v. Overseers of Fairfield*, 112 Pa. St. 99, 3 Atl. Rep. 862; *Kavanaugh v. Brown*, 1 Tex. 481.

¹ *Benton Co. v. Rutherford*, 33 Ark. 640.

² *Clark v. Clark*, 16 Oreg. 224, 18 Pac. Rep. 1.

³ *Kent v. Rand*, 64 N. H. 45, 5 Atl. Rep. 760.

⁴ *Jordan v. Keeble*, 85 Tenn. 412, 3 S. W. Rep. 511; *Booker v. Wingo*, 29 S. C. 116, 7 S. E. Rep. 49; *Stephens v. Deering (Ky.)*, 9 S. W. Rep. 292.

⁵ *Jordan v. Keeble*, 85 Tenn. 412, 3 S. W. Rep. 511.

⁶ *Condon v. Barr*, 49 N. J. Law, 53, 6 Atl. Rep. 614; *Aylett v. Ashton*, 1 Mylne & C. 105; *Francis v. Wigzell*, 1 Madd. 258; *Bradley v. Johnson*, 46 N. J. Law, 271; *Greatly v. Noble*, 3 Madd. 79, 94; *Stuart v. Kirkwall*, 3 Madd. 387; *Bank of Louisiana v. Williams*, 46 Miss. 618.

istence of the two being thus blended in one, the rule is, they cannot contract with each other, upon the familiar principle that it requires more than one person to effect a contract. And as the husband and wife are thus regarded as one person, they cannot contract between themselves at law, any more than a single person can contract with himself.¹ This is usually held to be still the rule as to dealings between husband and wife, though by statute the wife is empowered to make contracts as a *feme sole*.² The better rule, however, is, the wife may contract with her husband with reference to her separate, individual property, just as she could with a stranger, where she is thus enabled by law to contract generally concerning her separate estate; and this idea is supported by the great weight of authority as well as by common sense and good reason.³ This being true, property purchased with the earnings of either the husband or wife will not be subject to the debts of the other, though realized under a contract with the other for services, and converted, after payment, into other property.⁴ And the wife may become the owner of a note executed by her husband, and enforce its payment just as a stranger might do.⁵ She may become a creditor of her husband and take a mortgage on his property, or receive it by way of pledge to secure her debt, and may enforce the payment of the debt by a resort to the property, where there are no creditors of the husband having liens or incumbrances prior to those of the wife.⁶ However, before the rule that husband and wife can-

¹ *Tourney v. Sinclair*, 4 Miss. (3 How.) 324; *Ratcliffe v. Dougherty*, 24 Miss. 181; 2 Story, Eq. Jur., § 1367; *Johnson v. Vandervort*, 16 Neb. 144, 19 N. W. Rep. 461; *Barnett v. Harsbarger*, 105 Ind. 410, 5 N. E. Rep. 718; *Dyer v. Bean*, 15 Ark. 519; *Pillow v. Wade*, 31 Ark. 687; *Kitchen v. Bedford*, 13 Wall. 413; *Collinson v. Jackson*, 14 Fed. Rep. 305; *Pillow v. Sentele*, 49 Ark. 430, 5 S. W. Rep. 783; *Wyman v. Whitehouse*, 80 Me. 257; *Gaston v. Weir*, 84 Ala. 193, 4 S. Rep. 258.

² *Kalfus v. Kalfus*, 92 Ky. 542, 18 S. W. Rep. 366.

³ *Eddins v. Brick*, 23 Ark. 507; *Owen v. Cawley*, 36 N. Y. 600; *Bodine v.*

Killem, 53 N. Y. 93; *Noel v. Kinney*, 106 N. Y. 74, 12 N. E. Rep. 351; *Houston Gro. Co. v. McGinnis* (Ky.), 45 S. W. Rep. 514; *Logan v. Hall*, 19 Iowa, 491; *North v. North*, 166 Ill. 179, 46 N. E. Rep. 729; *Despain v. Wagner*, 163 Ill. 598, 45 N. E. Rep. 129; *Atkins' Est. v. Atkins*, 69 Vt. 270, 37 Atl. Rep. 746; *Furrow v. Athey*, 21 Neb. 671, 33 N. W. Rep. 208; *Brown v. Brown*, 22 Neb. 703, 36 N. W. Rep. 275.

⁴ *Houston Gro. Co. v. McGinnis* (Ky.), 45 S. W. Rep. 514.

⁵ *Knox v. Moser*, 69 Iowa, 341, 28 N. W. Rep. 629.

⁶ *Miller v. Krueger*, 36 Kan. 344, 13 Pac. Rep. 641.

not contract with each other, even at common law, can apply, there must be at the time of the contract a valid existing marriage. Living apart in a state of illicit intercourse is not sufficient to entitle either party to any benefits of the rule governing the rights, duties or liabilities of coverture.¹ But where there is a legal marriage, a promissory note executed by the wife to the husband, or by the husband to the wife, is void under the common-law rule; and the fact that it may be acquired by an innocent purchaser before maturity for value will not serve to give it validity.²

§ 206. Executory contract of wife.—A married woman, except as authorized by statute, not being able to make any contract with reference to her property, cannot, generally speaking, bind herself by an executory contract to convey. As said by Judge Story: "By the general principles of law, a married woman is, during her coverture, disabled from entering into any contract respecting her real property, either to bind herself or to bind her heirs; and this disability can be overcome only by adopting the precise means allowed by law to dispose of her real estate; as in England by a fine, and in America by a solemn conveyance."³ So, a contract by a husband to sell his wife's land is not binding on her, though known and assented to by her.⁴ Nor, of course, is an executory contract to sell her land; as, for instance, a bond binding herself to convey is not obligatory upon a married woman at common law.⁵ Nor can the equitable doctrine of estoppel be invoked to compel her to perform such a contract or prevent her from asserting her disability to make the same.⁶ This is true because the effort is entirely futile and can confer neither a legal nor an equitable title.⁷ In some of the states, however, she is authorized by stat-

¹ Vaughn v. Vaughn (Tenn.), 45 S. W. Rep. 677. 240; Innis v. Templeton, 95 Pa. St. 262; Chrisman v. Partee, 38 Ark. 31.

² Ellsworth v. Hopkins, 58 Vt. 705, 5 Atl. Rep. 405. ⁴ Rogers v. Brooks, 30 Ark. 612.

³ 2 Story, Eq. Jur., § 1391; Felkner v. Tighe, 39 Ark. 358; Wood v. Terry, 30 Ark. 385; Butler v. Buckingham, 5 Day (Conn.), 492, 501; Glidden v. Struppler, 52 Pa. St. 400; Stiver v. Tucker, 126 Pa. St. 74, 17 Atl. Rep. 541; Buchanan v. Hazzard, 95 Pa. St. 400; Holland v. Moon, 39 Ark. 120; Batte v. McCaa, 44 Ark. 398.

⁶ Davidson's Appeal, 95 Pa. St. 394; Buchanan v. Hazzard, 95 Pa. St. 240; Quim's Appeal, 86 Pa. St. 447.

⁷ Agricultural Bank v. Rice, 4 How. (U. S.) 225.

ute to make an executory contract with reference to her separate estate, and when this is the case such an agreement will warrant a decree of specific performance against her.¹

§ 207. Power of wife to contract—Rule in equity.— While the stern rule of the common law, viewing a wife as a part of her husband and by no means a separate individual, forbade her the right or power to make a contract, even with reference to her own separate property, yet the rule in equity is not so rigid or severe. Here a married woman is looked upon rather in the light in which she is regarded by the civil law; and the separate existence of the two is recognized to a considerable extent for many purposes. Among these is that of allowing the wife to make valid contracts with all persons capable of contracting, so far as binding her separate property is concerned, where, of course, she has attained her majority. And these agreements in equity will be enforced and respected to the extent of charging her separate property therewith, though the rule at law is entirely different.² Judge Story thus aptly expresses the rule: "In courts of equity, although the principles of law, in regard to husband and wife, are fully recognized and enforced in proper cases, yet they are not exclusively considered. On the contrary, courts of equity for many purposes treat husband and wife as the civil law treats them, as distinct persons, capable, in a limited sense, of contracting with each

¹ Union Brick & T. Co. v. Lorillard, 44 N. J. Eq. 1, 13 Atl. Rep. 613.

² Clark v. Hezekiah, 24 Fed. Rep. 663; Walter v. Walker, 48 Miss. 140; Cannel v. Buckle, 2 P. Wms. 243; Moore v. Moore, 47 N. Y. 467; Livingston v. Livingston, 2 Johns. Ch. 537; Wallingford v. Allen, 10 Pet. 583; 2 Kent, Comm. 164; Firemen's Ins. Co. v. Bay, 4 Barb. 407; Ward v. Shallet, 2 Ves. Sr. 16; Craig v. Chandler, 6 Colo. 543; McCampbell v. McCampbell, 2 Lea (Tenn.), 661; Wylly v. Collins, 9 Ga. 223; Dobbin v. Hubbard, 17 Ark. 189; Scott v. Bell, 2 Lev. 70; Lavender v. Blackstone, 2 Lev. 146; Smith v. Seiberling, 35 Fed. Rep. 677; Rudd v. Peters, 41 Ark. 177; Chadbourne v. Gilman, 64 N. H.

853, 10 Atl. Rep. 701; Gaines v. Cannon, 42 Ark. 503; Metsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. Rep. 351; Smith v. Dean, 15 Neb. 432, 19 N. W. Rep. 642; Stoy v. Stoy, 41 N. J. Eq. 370, 2 Atl. Rep. 638, 7 Atl. Rep. 625; Dale v. Lincoln, 62 Ill. 22; Sayers v. Wall, 26 Gratt. (Va.) 354; Pillow v. Sentelle, 49 Ark. 430, 5 S. W. Rep. 783; White v. Wager, 25 N. Y. 328; Hunt v. Johnson, 44 N. Y. 27; 1 Bl. Comm. 444; Matson v. Matson, 4 Metc. (Ky.) 262; Wells v. Treadwell, 28 Miss. 717; Putnam v. Bicknell, 18 Wis. 351; Winans v. Peebles, 32 N. Y. 423; Tallinger v. Mandeville, 113 N. Y. 427, 21 N. E. Rep. 125; Boyd v. De La Montagnie, 73 N. Y. 398; Bullard v. Briggs, 7 Pick. (Mass.) 533.

other, of suing each other, and of having separate estates, debts and interests.”¹ In equity a wife may sue her husband, and he, in turn, may, in the same tribunal, sue her, though neither could sue the other at law.² She may, of course, sue her husband in equity during coverture upon an equitable cause of action, as, for instance, to impress with a trust in her favor property bought by the husband with her funds, the title to which he took in his own name improperly or without authority from her.³ Or she may, likewise, sue him to charge property which he claims, with a trust for her, where the same has been conveyed by a trustee, holding in trust for her, to the husband.⁴ And where she is empowered by law to own property as a *feme sole*, she may sue her husband for partition of lands held by her with him in common.⁵ She may sue her husband in equity to compel him to repay her a loan made to him out of her separate estate.⁶ And generally, any good and valuable consideration paid in good faith will be sufficient to justify the interposition of chancery to sustain transactions between husband and wife.⁷

§ 208. Right of wife to contract on her own account.—Where the statute authorizes a wife to carry on a business, to contract, sue and be sued with reference to her separate property, and otherwise dispose of and control the same as if she were a *feme sole*, the authorities are agreed that she may, to the extent thus clearly permitted by the statute, make contracts in general concerning her separate property or estate. That contracts so made will be binding upon her and her separate estate.⁸ And where by law a married woman is authorized to

¹ 2 Story, Eq. Jur., § 1368.

² 2 Story, Eq. Jur., § 1368; Sackman v. Sackman (Mo.), 45 S. W. Rep. 264.

³ Reed v. Painter (Mo.), 46 S. W. Rep. 1089.

⁴ Walter v. Walter, 48 Mo. 140.

⁵ Moore v. Moore, 47 N. Y. 467.

⁶ Pillow v. Sentelle, 49 Ark. 430, 5 S. W. Rep. 783.

⁷ Smith v. Dean, 15 Neb. 432, 19 N. W. Rep. 642; Mehlhopp v. Pettibone, 54 Wis. 652, 11 N. W. Rep. 553.

⁸ Buckner v. Davis, 29 Ark. 444;

Messer v. Smith, 58 N. H. 298; Christensen v. Wells (S. C.), 30 S. E. Rep. 611; Stillwell v. Adams, 29 Ark. 846; Sidway v. Nichol, 62 Ark. 146, 84 S. W. Rep. 529; Sherrod v. Costigan (Mich.), 70 N. W. Rep. 140; Howes v. Bennett (Me.), 3 Atl. Rep. 661; Whelpley v. Stoughton (Mich.), 70 N. W. Rep. 1098; In re Hogan's Estate, 180 Pa. St. 500, 37 Atl. Rep. 548; McCord v. Blackwell, 31 S. C. 125, 9 S. E. Rep. 777; Price v. Planters' Nat. Bank, 93 Vt. 468, 23 S. E. Rep. 887; Walker v.

make contracts binding her separate estate, it is presumed, when she makes a contract concerning it, that she does so intending to so bind it.¹ The *onus* of showing the contrary, therefore, is imposed upon her.² She may bind her separate property by a contract with an attorney for legal services in procuring a divorce for her.³ And the contracts made by the husband on behalf of the wife and with reference to her separate property, he being properly authorized in this capacity by her, will bind her as effectively as though made by her in person.⁴ But in all cases where it is attempted to fix a liability upon a married woman, the cause of action must be shown to be strictly within the statute empowering the wife to contract.⁵

§ 209. Power of wife to become surety — Rule under modern statutes.— Some of the states have taken the precaution, in enacting statutes enlarging the powers of married women, to expressly provide that she shall not be liable as a surety for her husband or another, though she is given the power to make contracts generally with reference to her separate property. And the same rule seems to obtain by construction in jurisdictions where her authority to become a surety is not expressly restricted or forbidden, it being generally held that the authority of a married woman to make contracts in general relating to her separate business or estate does not include the power to bind herself as surely unless in the contract of suretyship it is expressed and agreed by the parties that her separate property is to become bound.⁶ And when the contract of suretyship is

Jessup, 43 Ark. 163; Tarr v. Friend, 6 Kan. App. 48, 49 Pac. Rep. 633; Fitzgerald v. Phelps & Bigelow Wind Mill Co., 42 W. Va. 577, 26 S. E. Rep. 315; Real v. Hollister, 17 Neb. 661, 24 N. W. Rep. 333; Zurn v. Noebel, 113 Pa. St. 336, 6 Atl. Rep. 63; Robinson v. Blair (Pa.), 3 Atl. Rep. 669; Ahern v. Fink, 64 Md. 161, 3 Atl. Rep. 32; Good v. Moulton, 67 Cal. 536, 8 Pac. Rep. 63; Mohr v. Senior, 85 Ala. 114, 4 S. Rep. 736; Brown v. Thompson, 27 S. C. 500, 4 S. E. Rep. 345; Hickey v. Thompson, 52 Ark. 234, 12 S. W. Rep. 475. And see Duncan v. Freeman, 109 Ala. 185, 19 S. Rep. 433.

¹ Price v. Planters' Nat. Bank, 92 Va. 468, 23 S. E. Rep. 887.

² Union Stock Yards Nat. Bank v. Coffman, 101 Iowa, 594, 70 N. W. Rep. 693.

³ Oswalt v. Moore, 19 Ark. 257.

⁴ Christensen v. Wells (S. C.), 30 S. E. Rep. 611; Buetel v. Standau (Kan. App.), 53 Pac. Rep. 836.

⁵ Jackson v. Knox, 24 S. Rep. 724.

⁶ Stiles v. Lord (Ariz.), 11 Pac. Rep. 314; Perkins v. Elliott, 22 N. J. Eq. 127; Russell v. Bank, 39 Mich. 671; Dunbar v. Mize, 53 Ga. 435; Kohn v. Russell, 91 Ill. 138; Gillespie v. Smith, 20 Neb. 455, 30 N. W. Rep. 526; Eck-

thus made by a married woman where the statute empowers her to contract with reference to, and to dispose of, her separate estate, she may, generally speaking, become the surety of either her husband or a stranger.¹ But the mere recital in the contract of suretyship that its purposes are for the benefit of the separate estate of the wife will not estop or preclude her from showing the contrary in bar of an action against her by reason of the contract when the obligation is not in fact a suretyship.² But she would be estopped to assert this defense against an innocent holder of a negotiable instrument for value before maturity.³ Sometimes it is provided by statute that a married woman may contract or bind her separate property with the written or other consent of her husband. And whenever by statute her power to contract is thus limited, her obligations will not be enforced except when clearly within the terms of the law authorizing her to make the contract.⁴ And generally whether a contract has been so made will be a question of fact to be determined from all the circumstances of the particular case.⁵ An agreement by the creditor of the husband to extend the time of the maturity of his debt is generally held to be a sufficient

man v. Scott, 34 Neb. 817, 52 N. W. Rep. 822; Payne v. Vurnham, 62 N. Y. 74; Godfrey v. Megahan, 38 Neb. 748, 57 N. W. Rep. 284; Webb v. Hoselton, 4 Neb. 308; State Nat. Bank v. Smith (Neb.), 75 N. W. Rep. 51; Barnum v. Young, 10 Neb. 309, 4 N. W. Rep. 1054; Feather v. Feather's Estate (Mich.), 74 N. W. Rep. 524; Union Stock Yards Nat. Bank v. Coffman (Neb.), 70 N. W. Rep. 693; Connor v. Abbott, 35 Ark. 365; Emerson-Talcott Co. v. Knapp, 90 Wis. 35, 62 N. W. Rep. 945; Stephens v. Beall, 89 U. S. 329; Smith v. Bond (Neb.), 76 N. W. Rep. 1062; Littlefield v. Dingwall, 71 Mich. 223, 39 N. W. Rep. 88; Bailey v. Pearson, 29 N. H. 77. See also Major v. Holmes, 124 Mass. 108; Goodnow v. Hill, 125 Mass. 587, for an apparently contrary rule under statute in Massachusetts.

¹ Crevier v. Belerdick (N. J. Law), 37 Atl. Rep. 959; Commonwealth v.

Abbott, 168 Mass. 471, 47 N. E. Rep. 112; Hagenbuch v. Phillips, 112 Pa. St. 284, 3 Atl. Rep. 788; Kuhn v. Ogilvie, 178 Pa. St. 303, 35 Atl. Rep. 957; Kittitas Co. v. Travers, 16 Wash. 528, 48 Pac. Rep. 340.

² Egan v. Raysor (S. C.), 27 S. E. Rep. 475. And see Scottish-American Mfg. Co. v. Mixson, 38 S. C. 432, 17 S. E. Rep. 244.

³ White v. Goldsberg, 49 S. C. 530, 27 S. E. Rep. 517.

⁴ Strauss v. Glass, 108 Ala. 546, 18 S. Rep. 526; Canal Bank v. Partee, 99 U. S. 325; McAnally v. Alabama Insane Hospital, 109 Ala. 397, 19 S. Rep. 492; Larkin v. Woosley, 109 Ala. 259, 19 S. Rep. 520; Causey v. Snow, 120 N. C. 279, 26 S. E. Rep. 775.

⁵ Grand Island Banking Co. v. Wright (Neb.), 74 N. W. Rep. 82; Stenger Benev. Ass'n v. Stenger (Neb.), 74 N. W. Rep. 846.

consideration for a wife to become a surety therefor with reference to her own property.¹ Likewise is a loan of money to the husband in the first instance.²

Of course, when the statute expressly excepts contracts of suretyship in enabling married women to make contracts on their individual responsibility, their agreements of suretyship can have no force, and this practically brings back the rule at common law. In other words, the common-law disability of the wife to make binding contracts is retained to this extent.³ And when this is the case a mortgage executed by the wife to secure the debt of her husband or a stranger is absolutely void.⁴ Nor does the fact that the debt or mortgage or both are transferred before maturity to an innocent party for a valuable consideration alter the case in the least. The power of the wife to become surety having been expressly denied by statute, and not existing at common law, no transfer of a void instrument thus executed by her can vest her with authority to so contract.⁵ Further than this, she cannot even become surety on a debt which is made for the benefit of her separate estate where she is expressly forbidden to become surety by statute, though she may contract in general in connection with her separate property or business.⁶ And, generally, the question whether the wife is bound in any event as a surety will depend upon

¹ *Greene v. Scranage*, 19 Iowa, 461; *Low v. Anderson*, 41 Iowa, 476; *Smith v. Spaulding*, 40 Neb. 339, 58 N. W. Rep. 952. And see *Cooper v. Bank* (Okla.), 46 Pac. Rep. 475.

² *Watts v. Gantt*, 42 Neb. 867, 61 N. W. Rep. 104.

³ *Allen v. Davis*, 99 Ind. 216; *West v. Hays*, 104 Ind. 30, 3 N. E. Rep. 610; *Schmidt v. Spencer*, 87 Mich. 121, 49 N. W. Rep. 479; *Stillwell v. Adams*, 29 Ark. 346; *Orr v. White*, 106 Ind. 344, 6 N. E. Rep. 909; *Trentman v. Eldridge*, 98 Ind. 525; *Vogel v. Liechner*, 102 Ind. 55, 1 N. E. Rep. 554; *Dodge v. Tinzey*, 101 Ind. 102; *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. Rep. 565; *Brown v. Will*, 103 Ind. 7, 2 N. E. Rep. 283; *Boyd v. Radadaugh* (Ind.), 50 N. E. Rep. 301; *Warey v. Forst*, 102 Ind. 205, 26 N. E. Rep. 87;

Monroe v. Haas (Ga.), 3 S. E. Rep. 654; *Waterbury v. Andrews*, 67 Mich. 281, 34 N. W. Rep. 575; *De Vries v. Conklin*, 22 Mich. 255; *Emery v. Lord*, 26 Mich. 431; *Fisk v. Mills*, 104 Mich. 133, 62 N. W. Rep. 559; *Chamberlain v. Murrin*, 92 Mich. 362, 52 N. W. Rep. 640.

⁴ *Engler v. Ackler*, 106 Ind. 223, 6 N. E. Rep. 342; *Crooks v. Kennett*, 111 Ind. 347, 12 N. E. Rep. 715; *Jones v. Ewing*, 107 Ind. 313, 6 N. E. Rep. 819; *Merchants' & L. Bldg. Ass'n v. Scanlan*, 144 Ind. 11, 42 N. E. Rep. 1008; *Cole v. Temple*, 142 Ind. 498, 41 N. E. Rep. 942.

⁵ *Cole v. Temple*, 142 Ind. 498, 41 N. E. Rep. 942.

⁶ *Wiltbank v. Tobler*, 181 Pa. St. 103, 37 Atl. Rep. 188; *Richardson v. Stephens* (Ala.), 21 S. Rep. 949.

the intention of the parties to the transaction rather than the purpose to which the fruits thereof are afterwards applied.¹ The power of the wife to become a surety so as to bind herself or her separate estate, either specially or in general, is frequently a subject of legislative action. Sometimes it is denied or taken entirely away. Sometimes it is given with the consent of her husband, and in divers ways restricted otherwise. The prudent reader will therefore carefully regard the provisions of the statutes of his own state, and from them and their relation to, and effect upon, the common law, arrive at an intelligent conclusion.² It being borne in mind always that the power or authority of a married woman to bind herself as a surety, or in any similar manner, must appear in the statute authorizing it by a strict construction thereof, nothing being presumed in order to enlarge her liability at common law or to take away any of the disabilities of coverture and the protection of married women incident thereto.³ And of course a married woman becoming surety for either herself or husband has a right to the benefit of the rule of law that an undertaking of suretyship will be construed strictly, and a liability will never be imposed upon the surety unless clearly within the terms of the contract.⁴

§ 210. Joint contracts under modern statutes.—Generally, under statutes existing at this day, a wife is not liable on a note or other contract as a joint maker with her husband where the note represents his individual indebtedness. But where the wife is empowered to contract, whether without limit or with reference to her separate estate only, the fact that the

¹ *Surety Co. v. Arbuckle*, 119 Ind. 69, 21 N. E. Rep. 469.

² See, generally, *Lewis v. Howell*, 98 Ga. 428, 25 S. E. Rep. 504; *Richardson v. Stephens* (Ala.), 21 S. Rep. 949; *American Mortgage Co. v. Hartzog*, 74 Fed. Rep. 993; *Kane v. Mann*, 93 Va. 239, 24 S. E. Rep. 938; *Mickleberry v. O'Neal*, 98 Ga. 42, 25 S. E. Rep. 933; *Shew v. Call*, 119 N. C. 450, 26 S. E. Rep. 33; *Granger v. Roll*, 6 S. D. 611, 62 N. W. Rep. 970; *Carton v. David*, 18 Nev. 310, 4 Pac. Rep. 61; *Dial v. Agnew*, 28 S. C. 454, 6 S. E. Rep. 295; *Union Nat. Bank v. Hart-*

well, 84 Ala. 186, 4 S. Rep. 156; *Els-ton v. Comer*, 108 Ala. 76, 19 S. Rep. 324; *Osborn v. Cooper*, 113 Ala. 405, 21 S. Rep. 320; *Sherrod v. Dixon*, 120 N. C. 60, 26 S. E. Rep. 770; *Clements v. Draper*, 108 Ala. 211, 19 S. Rep. 25; *Berwick v. Frere*, 49 La. Ann. 201, 21 S. Rep. 692; *Johnson v. Pesson*, 49 La. Ann. 109, 21 S. Rep. 177; *Giddens v. Powell*, 108 Ala. 621, 19 S. Rep. 21.

³ *McCollum v. Doughton*, 132 Mo. 601, 34 S. W. Rep. 480.

⁴ *First Nat. Bank v. Goodman* (Neb.), 77 N. W. Rep. 756.

husband joins with her in the contract does not relieve her of liability. If she would be liable individually without the husband joining, she will be so with him.¹

§ 211. Contract of wife — Validity — Conflict of laws.— It may often happen that a contract executed by a wife may be enforced in one jurisdiction or state when it would be deemed void and of no force in another. In order to ascertain, therefore, whether a contract of a married woman may or may not be enforced, it will be necessary to look to the law governing the contract. This law is aptly expressed in the following language of the supreme court of the United States: "Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as bringing of suit, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought."² Upon this principle it is held where a married woman executed a note in Georgia to pay an indebtedness of her husband, and being sued thereon in that state where the statute provides that "she cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband," that she will not be liable on such a note, even though it come to the hands of an innocent purchaser for value before maturity; the statute further providing that such an obligation of the wife shall be

¹ *Frecking v. Rolland*, 53 N. Y. 422; *Holmes v. Reynolds*, 55 Vt. 39; *Noel v. Kumey*, 106 N. Y. 74, 12 N. E. Rep. 351; *Krouskop v. Shoutz*, 51 Mich. 204, 8 N. W. Rep. 478; *Ward v. Berkshire Life Ins. Co.*, 108 Ind. 301, 9 N. E. Rep. 361.

² *Scudder v. Union Nat. Bank*, 91 U. S. 406. And see, to like effect, *Commercial Bank v. Auze*, 74 Miss. 609, 21 S. Rep. 754; *White v. Friedlander*, 35 Ark. 52; *Bank of Harrison v. Gibson*, 60 Ark. 269, 30 S. W. Rep. 39; *Cox v. Morrow*, 14 Ark. 603; *Wallace v. Lehman*, 36 Ark. 569; *Bowles*

v. Eddy, 33 Ark. 645; *Parsons Oil Co. v. Boyett*, 44 Ark. 230; *Mathews v. Paine*, 47 Ark. 54, 14 S. W. Rep. 463; *Equitable Bldg. & Loan Ass'n v. Hoffman*, 50 S. C. 303, 27 S. E. Rep. 692; *Thompson v. Kyle (La.)*, 23 S. Rep. 13; *Lanier v. Union Mortg., B. & T. Co.*, 64 Ark. 39, 40 S. W. Rep. 466; *Evans v. Cleary*, 125 Pa. St. 204, 17 Atl. Rep. 440; *Swann v. Swann*, 21 Fed. Rep. 299; *Campbell v. Crampton*, 2 Fed. Rep. 417; *Andrews v. Pond*, 13 Pet. 65; *Baum v. Birchall*, 150 Pa. St. 164, 24 Atl. Rep. 620; *Sawyer v. Dickson (Ark.)*, 48 S. W. Rep. 903.

void absolutely, not voidable only.¹ If a married woman has no ability under the laws of the state of her domicile to execute a contract, the obligation can take on no greater dignity or force because sued on in a state other than where such domicile is situated.² So, where a married woman who lived and had her domicile in Indiana executed a deed of trust on realty in Ohio to secure an indebtedness as surety, which she was forbidden by the laws of Indiana to do, it was correctly held in an action on the obligation in Ohio that it was void both in that state and Indiana.³ It has been held that the contract of a married woman executed beyond her domicile may be enforced where she would be capable of making such an obligation in the place where made.⁴ This might be correct enough as to suits thereon in the place where made, and to the extent that only real estate in the jurisdiction of the forum might be resorted to in order to realize the liability; but it is at least doubtful if a judgment so recovered could be enforced in the state where the married woman has her domicile. For, to allow this, would be to defeat the laws of the domicile. The laws of the domicile, too, usually govern the status of personal property to a large extent, as such property is presumed to have no situs, but to follow that of the domicile of the owner.⁵ If a married woman is forbidden by the laws of the state in which she lives to make certain contracts, such restrictions of the laws of her domicile certainly could not be set at naught by her in going across the boundary of the state of her domicile into another, where any contract she might make would be sanctioned. Certainly any contract thus made in another state, or a judgment rendered thereon in such state, could not be enforced in the state of domicile against any property, real or personal, within such jurisdiction.

¹ *March v. Clark*, 9 Fed. Rep. 753.

² *Matthews v. Murchison*, 17 Fed. Rep. 760, 768; *Evans v. Cleary*, 125 Pa. St. 204, 17 Atl. Rep. 440; *Spearman v. Ward*, 114 Pa. St. 634, 8 Atl. Rep. 430; *Milliken v. Pratt*, 125 Mass. 374; *Ruhe v. Buck*, 124 Mo. 178, 27 S. W. Rep. 412; *Robinson v. Queen*, 87 Tenn. 445. 11 S. W. Rep. 38; *Appeal of Freeman*, 68 Conn. 533, 37 Atl. Rep. 420. And see, too, *Bank v. Williams*,

46 Miss. 618; *Herman v. Jeffries*, 5 Mont. 28, 1 Pac. Rep. 11.

³ *Evans v. Beaver*, 50 Ohio St. 190, 33 N. E. Rep. 643.

⁴ *Bowles v. Field*, 78 Fed. Rep. 42.

⁵ *Armstrong v. Best*, 112 N. C. 59, 17 S. E. Rep. 14; *Hanover Nat. Bank v. Howell*, 118 N. C. 271, 23 S. E. Rep. 1005; *Johnson v. Gawtry*, 11 Mo. App. 322.

§ 212. **Husband working for wife — Salary — Rights of creditors.**—Under the modern statutes authorizing the wife to contract as a *feme sole*, it is usually held that she may contract with her husband. This being true she may, of course, employ him in her separate business, just as she might a stranger, and pay him a reasonable salary. And this salary, when not more than enough to support the husband's family, and when actually thus used, is beyond the reach of creditors, for the law requires him to supply his family with necessaries, and the creditors will not be heard to complain of that which the law enjoins upon him.¹ The husband "has the right to give his personal services and skill to the management of his wife's property, without any other compensation than the support and maintenance of himself and family."² And where the husband works for the wife in the management of her business, and is paid by her a reasonable compensation, which is not more than is necessary for the support of himself and family, creditors of the husband have no right to resort to the property of the wife, whether it be original stock in trade, the profits arising from the business, or other legitimate income.³ And this is true though by the business sagacity and good management of the husband the property of the wife increases largely in value. She has as much right to the benefit of the skill of her husband, when the law permits her to employ him, as she would have to the prudence or sagacity of any stranger whom she might engage.⁴ That the wife employs her husband to manage her property or work for her in her business or otherwise as her agent or servant is no evidence of fraud.⁵ Neither

¹Aldridge v. Muirhead, 101 U. S. 397; Voorhees v. Bonesteel, 16 Wall. 16; Phillipps v. Hall, 160 Pa. St. 60, 28 Atl. Rep. 502; Paull v. Parks (Ky.), 45 S. W. Rep. 873; Cooper v. Ham, 49 Ind. 393; Gage v. Dauchy, 34 N. Y. 293; Webster v. Hildreth, 33 Vt. 457; Seay v. Hesse, 123 Mo. 450, 24 S. W. Rep. 1017; Talcott v. Arnold, 54 N. J. Eq. 570, 35 Atl. Rep. 532; Kutcher v. Williams, 40 N. J. Eq. 436, 3 Atl. Rep. 257.

²Cooper v. Ham, 49 Ind. 393; Gage

v. Dauchy, 34 N. Y. 293; Vernheim v. Daggett, 60 Barb. 316.

³Paull v. Parks (Ky.), 45 S. W. Rep. 873; Gage v. Dauchy, 34 N. Y. 293; Talcott v. Arnold, 54 N. J. Eq. 570, 35 Atl. Rep. 532.

⁴Martin v. Remington (Wis.), 76 N. W. Rep. 614; Taylor v. Wands (N. J. Law), 37 Atl. Rep. 315; Mayers v. Keiser, 85 Wis. 382, 55 N. W. Rep. 688; Talcott v. Arnold (N. J. Err. & App.), 37 Atl. Rep. 891, reversing 54 N. J. Eq. 570, 35 Atl. Rep. 532.

⁵Cooper v. Ham, 49 Ind. 393.

is possession in the husband of the property of his wife any test of the title.¹ And it is no fraud by the husband upon his creditors for him to devote his time and talent to the management of the business or property of his wife for a compensation sufficient to support himself and family.² Or he may work for her gratuitously without prejudicing the rights of creditors.³ She may conduct a mercantile business through the agency of her husband in her own name, where the capital is furnished by her and her husband has no interest therein other than as agent or servant of his wife.⁴ In other words, the courts have no power "to compel men to work for their creditors who may perversely prefer to work for the benefit of their wives and children."⁵ And it seems that the husband cannot recover from the wife for his work and talent bestowed on her property in the absence of an express agreement on her part to pay for same.⁶ This probably rests upon the principle that no compensation is presumed to be meant for services rendered a child by a parent and *vice versa*, or others occupying a family relation to each other. And the creditors of the husband cannot resort to the property of the wife for the payment of their debts owing by the husband, though the husband may have bestowed his labor and energies upon it, thereby greatly enhancing its value.⁷ This is true even though the husband furnished material with which to improve the property, where the material so furnished is exempt from execution by law.⁸

§ 213. Wife employing husband — When fraudulent.— While a wife may employ her husband to manage her own separate property, she cannot engage him to manage that which is his; for his creditors have a right to resort to his property to realize their claims. The husband will not be permitted to manage or operate his property, bestow his time and talent

¹ Keeny v. Good, 21 Pa. St. 349.

² Cooper v. Ham, 49 Ind. 393.

³ Buckley v. Wells, 83 N. Y. 518; Dayton v. Walsh, 47 Wis. 113, 2 N. W. Rep. 65; Hessfeldt v. Dill, 28 Minn. 469, 10 N. W. Rep. 781.

⁴ Buckley v. Wells, 83 N. Y. 518; Abbey v. Deyo, 44 Barb. 374.

⁵ Webster v. Hildreth, 33 Vt. 457,

459. And see Pierce v. Estate of Pierce, 25 Vt. 511.

⁶ Stanley v. Stanley, 14 Ind. 398; Broadwater v. Jacoby, 19 Neb. 77, 26 N. W. Rep. 629. And see Harrell v. Harrell, 117 Ind. 94, 19 N. E. Rep. 621.

⁷ Nance v. Nance, 84 Ala. 375, 4 S. Rep. 699.

⁸ Nance v. Nance, 84 Ala. 375, 4 S. Rep. 699.

thereon, build it up and make it valuable, though all this is done in the capacity of a servant or employee of his wife, and the business conducted in her name. And whether his estate be thus built, or whether by accident, misfortune or bad management this is not the case, yet what remains, whether more or less, will be subject to his debts, if the property thus managed be not exempt by law.¹ And while the cases of fraud in these transactions between husband and wife usually arise out of controversies by creditors of the husband to realize their claims, yet, when the order of things is reversed and it is sought by creditors of the wife to reach property claimed by the husband, the same general rules touching fraudulent transactions should apply. Upon principle the wife should not be permitted, whether gradually or otherwise, and whether acting in her own proper person or through an agency vested by her in her husband, or both, to place her property beyond the reach of her own creditors under the guise of an employment of her husband. For instance, if a wife should employ her husband to manage her business at a salary in excess of the reasonable value of his services, or greater than she could engage others equally as competent and reliable, whereby the husband receives such an amount above his necessary and legitimate living expenses as to thereby absorb the property in whole or in part, he certainly should be charged in favor of the creditors of the wife with any surplus over and above a reasonable and just compensation. For, were it otherwise, the wife could thus indirectly turn her property in whole or in part, as the case might be, over to her husband, leaving her just creditors without anything from which to realize their debts. But if the wife should properly and in good faith employ her husband to manage her business on a basis of compensation not in excess of a proper and reasonable salary, doubtless there would be no fraud in this alone. And in any event, no doubt, the burden of showing the fraudulent nature of the transaction would be on the party alleging it.

§ 214. Power of wife to sue alone at common law.—Under the common law a wife could not, as a rule, maintain an action

¹ *Waddingham's Ex'rs v. Loker*, 44 16 Ohio St. 509; *National Bank of the Mo.* 182. And see *Murphin v. Taylor*, *Metropolis v. Sprague*, 20 N. J. Eq. 13.

alone. If a right of action accrued to her, she had to sue jointly with her husband, unless the subject-matter of the suit was a claim of some kind against him or his property rights. When this was the case, the wife had to sue in the name of her next friend, after the manner of bringing actions for infants through the medium of such representatives.¹ The right to sue is analogous to the right or power to make contracts, and the wife is forbidden to resort to the courts under the common law, upon principles similar to those forbidding her the right to make contracts. If she had a right to sue, others would naturally have a right to sue her, and were she capable of being sued, a material part of the salient protection of coverture which the law throws around her would be taken away.

§ 215. **Right of wife to sue — Modern statutes.**— As a general rule, a married woman may sue alone and in her own name and right to enforce any cause of action arising upon her separate contracts, or with reference to her separate estate or property, where she is empowered by law to contract in her own right, and manage and control her separate and individual property as a *feme sole* might do.² She may also sue jointly with her husband when she has, in her own right, an interest with him in any cause of action.³ And it would seem to follow, upon principle, that she could likewise join in an action with a stranger having an interest in the subject-matter of the suit. Where a married woman sues upon a contract which she has made with a stranger, the disability of coverture cannot be pleaded by him in bar of the right to recover, the disability being a privilege personal to the wife and not given to her by

¹ *Bein v. Heath*, 6 How. (U. S.) 228; (Ky.) 262; *Grandjean v. San Antonio Douglas v. Butler*, 6 Fed. Rep. 228; (Tex. Civ. App.), 38 S. W. Rep. 837; *Taylor v. Holmes*, 14 Fed. Rep. 498; *Fox v. Manufacturers' Fire Ins. Co.*, 31 W. Va. 374, 6 S. E. Rep. 929; *Clay Cummings v. Cummings* (Cal.), 14 Pac. Rep. 562. And see *Neale v. Hermans*, 65 Md. 474, 5 Atl. Rep. 424; *Countz v. Markling*, 30 Ark. 17.

² *James, Ex'r, v. Taylor*, 43 Barb. 430; *Spears v. Lumpkin*, 39 Ala. 600; *McConeghy v. McCaw*, 31 Ala. 447; *Emerson v. Clayton*, 32 Ill. 493; *Stull v. Howard*, 26 Ind. 456; *Darby v. Callaghan*, 16 N. Y. 71; *Gee v. Lewis*, 20 Ind. 149; *Matson v. Matson*, 4 Metc. 515; (Ky.) 262; *Grandjean v. San Antonio Douglas v. Butler*, 6 Fed. Rep. 228; (Tex. Civ. App.), 38 S. W. Rep. 837; *Fox v. Manufacturers' Fire Ins. Co.*, 31 W. Va. 374, 6 S. E. Rep. 929; *Clay v. St. Albans*, 43 W. Va. 539, 27 S. E. Rep. 368; *Sykes v. Chadwick*, 18 Wall. 141; *Benson v. Morgan*, 50 Mich. 77, 14 N. W. Rep. 705; *Chaplin v. Holmes*, 27 Ark. 414; *Cairo & Fulton R. R. Co. v. Parks*, 32 Ark. 131; *Van Orden v. Van Orden* (N. J. Eq.), 41 Atl. Rep. 671.

³ *Carter v. Uhlein* (N. J. Eq.), 38 Atl. Rep. 956.

the law for the convenience or protection of strangers.¹ And where the wife is empowered to sue generally, she may sue alone upon a cause of action accruing to her for a tort or injury.² Especially is this true when the husband has abandoned his wife.³

§ 216. Right of wife to sue for personal injury.—Adhering rigidly to the common-law fiction of absolute unity of the husband and wife, the wife was not permitted at common law to sue alone even for an injury to her person. But in order to recover in such a case the action had to be brought in the name of both husband and wife, and this could not be done without the consent of the husband. It was therefore within the power of the husband, so long as he lived and the marriage contract was in force, to defeat this right of the wife.⁴ Blackstone gives a necessary exception to this general rule, which is found in instances where the husband has abjured the realm or been banished, for he then becomes *civiliter mortuus*, and the right of the wife to sue becomes perfect.⁵ Where the statute enables a married woman to carry on a separate business on her own account and in her individual right, free from any right or authority of her husband, she will have a right of action alone for personal injury inflicted upon her which incapacitates her to perform work and labor in her business.⁶ But such statutes do not authorize her to sue alone for an assault or other personal injury which does not disable her from attending to her separate estate or looking after her individual business, which the statute expressly authorizes her to carry on.⁷ And gener-

¹ Moore v. Price (Ala.), 22 S. Rep. 531.

² Strather v. Aberdeen & A. R. R. Co. (N. C.), 31 S. E. Rep. 386.

³ Andrews v. Runyun, 65 Cal. 629, 4 Pac. Rep. 669; Palmer v. McMasters, 6 Mont. 169, 9 Pac. Rep. 898.

⁴ Russel v. Corne, 1 Salk. 119; 1 Bl. Comm. 443.

⁵ 1 Bl. Comm. 443.

⁶ Harmon v. Old Colony R. R. Co., 165 Mass. 100, 42 N. E. Rep. 505; Southern Kansas Ry. Co. v. Pavey, 48 Kan. 452, 29 Pac. Rep. 593; Nor-

folk & W. R. R. Co. v. Dougherty, 92 Va. 372, 23 S. E. Rep. 777; Richmond Ry. & E. Co. v. Bowles, 92 Va. 738, 24 S. E. Rep. 388; Fleming v. Shenandoah, 67 Iowa, 505, 25 N. W. Rep. 752; Wyandotte v. Agan, 37 Kan. 528, 15 Pac. Rep. 529; Baldwin v. Second St. Cable Ry. Co., 77 Cal. 390, 19 Pac. Rep. 644; Atlantic & D. R. R. Co. v. Ironmonger (Va.), 29 Atl. Rep. 319.

⁷ Wolf v. Bauereis, 72 Md. 481, 19 Atl. Rep. 1045.

ally, where the husband has culpably and permanently abandoned his wife, she is permitted to sue alone for injuries to her person, especially under statutes enlarging her common-law rights.¹ If the tort should arise from a breach of contract with the husband, and this breach is alleged as the ground of the action, no recovery could be had by the wife, and the husband should sue alone. Thus, when a physician was employed to treat the wife, and, by reason of the failure to perform his contractual duty, an injury resulted to her, the husband alone would have a right of action for breach of the contract, that being the ground of action. And there being no privity of contract between the wife and the tort-feasor, she would have no right to sue for the injury as upon breach of contract. But if the damages are laid in tort regardless of contract, the right to sue is in the wife and she may recover jointly with her husband.² The wife may sue alone to annul a release of a right of action with reference to her separate property obtained from her by fraud or unfairness.³ This of course is only where some statute expressly authorizes a married woman to sue in her own right upon such a cause of action.

§ 217. When wife may be sued alone.—Of course, at common law, the wife could not, as a general thing, if at all, be sued alone upon any cause of action during coverture.⁴ But under statutes now generally in force giving her dominion over her separate property and authorizing her to sue and be sued with reference thereto as a *feme sole*, the correct rule would seem to be that whenever she has a right to maintain an action alone concerning her separate property, she could, if liable to an action, be sued alone upon the same subject-matter. There can be no good reason advanced for a rule denying any one the right to maintain a cause of action against a married woman alone, when, if the order of things were reversed, she could assert her right in her own name.⁵ In fact it is entirely im-

¹ Wolf v. Bauereis, 72 Md. 481, 19 Atl. Rep. 1045; Gregory v. Pierce, 4 Metc. (Mass.) 478; Baumeister v. Markham (Ky.), 39 S. W. Rep. 844; Lammiman v. Detroit Citizens' St. Ry. Co. (Mich.), 71 N. W. Rep. 153.

² Dashiell v. Griffith, 84 Md. 363, 35 Atl. Rep. 1094.

³ Corey v. Howard, 19 R. I. 728, 37 Atl. Rep. 946.

⁴ Griffith v. Clark, 18 Md. 457; Lowenkamp v. Roechling, 64 Md. 95, 8 Atl. Rep. 35.

⁵ Meyers v. Rahte, 46 Wis. 655, 1 N. W. Rep. 353; Farrar v. Emery, 52 Iowa, 725, 3 N. W. Rep. 50; Cramer

proper, as well as unnecessary, to join the husband as a party defendant in such cases; and if this should be done, the complaint or petition would be vulnerable to demurrer for non-joinder of parties.¹ But if the husband and wife should execute a joint mortgage on the lands of the wife to secure her separate and individual indebtedness, it would be then necessary to join him as a party defendant in foreclosure proceedings under the mortgage, for he has an interest in the lands of his wife.² The wife may be sued without joining her husband for partition of lands, a portion of which is owned by herself in her own right.³ She may be sued jointly with him on a joint and several bond executed by them to the state, where the statute makes her jointly liable with him "on any note, bill of exchange, single bill, bond, contract or agreement which she may have executed jointly with her husband."⁴ Likewise she will, of course, be liable upon a check similarly executed.⁵ But the right to sue a *feme covert*, alone, must be found in the letter of the statute and warranted by a strict construction thereof.⁶ So, where the statute authorizes a suit against a married woman on any bill of exchange or like instrument, she cannot be sued upon a verbal agreement or contract, though the same might have been evidenced by such a writing had the parties thereto so desired and acted.⁷ Further, the declaration or complaint must affirmatively show a state of facts which would come within the law fixing the liability upon the wife, otherwise it would be demurrable.⁸

v. Hannaford, 53 Wis. 85, 10 N. W. Rep. 15; Waggoner v. Turner, 60 Iowa, 127, 28 N. W. Rep. 568; Fawcner v. Scottish-American Mfg. Co., 107 Ind. 555, 8 N. E. Rep. 689; Brackett v. Drew, 20 N. H. 441; Pickens v. Oliver, 29 Ala. 528; Boynton v. Sawyer, 35 Ala. 497; Niniger v. Board of Commissioners, 10 Minn. 133.

¹ McKune v. McGarvey, 6 Cal. 497; Musselman v. Gallagher, 32 Iowa, 383.

² Wolf v. Banning, 3 Minn. 202.

³ Estel v. Nell, 140 Mo. 639, 41 S. W. Rep. 940.

⁴ Smith v. State, 66 Md. 215, 7 Atl. Rep. 49. And see Wingert v. Gordon,

66 Md. 106, 6 Atl. Rep. 581; Lawrence v. Armstrong (Tenn. Ch. App.), 48 S. W. Rep. 403.

⁵ Wilderman v. Rogers, 66 Md. 127, 6 Atl. Rep. 588.

⁶ Davis v. First Nat. Bank, 5 Neb. 242; Hale v. Christy, 8 Neb. 264; State Savings Bank v. Scott, 10 Neb. 83, 4 N. W. Rep. 314; Todd v. Lee, 16 Wis. 506; Frary v. Booth, 87 Vt. 78.

⁷ Sturmfels v. Frickey, 43 Md. 569; Howard Pub. Co. v. Benjamin, 84 Md. 333, 35 Atl. Rep. 930.

⁸ Juchert v. Johnson, 108 Ind. 436, 9 N. E. Rep. 413; Bolman v. Overall, 80 Ala. 451, 2 S. Rep. 624.

§ 218. Right of wife to recover for death of husband — Lord Campbell's Act.— Under the provisions of Lord Campbell's Act, which is generally embodied in the statutory law of the various states in a more or less modified form, the widow and next of kin are given a right of action for the death of the husband. In such cases the measure of damages recoverable is not the loss or suffering of the deceased himself, but the injury necessarily resulting to his widow and next of kin by reason of his death.¹ And it is by no means necessary, before a recovery can be had, that the wife have any lawful claim on her husband for support. The statutes give the remedy regardless of such considerations.² But in all cases under these laws the wife can only recover for the pecuniary loss. She cannot have an action for the bereavement or grief which she naturally or necessarily suffers by reason of the death of her husband.³ As she has a right of action for the wrongful killing, she may, of course, execute a binding acquittance or release, for a good consideration, to the wrong-doer, which, in the absence of fraud or imposition, will preclude her from any further right of action.⁴ She had no such right of action at common law; for, under the old rule, the law gave no damages for the death of a person. These rights of the wife, therefore, must be found in the letter of the statute, as such statutes are an innovation upon the old law.⁵

§ 219. Wrongful death of husband — Right of action — Measure of recovery.— The damages recoverable on the part of the wife for the death of her husband wrongfully brought about by another will usually depend largely upon each particular case and its circumstances. Generally, this will be a question of fact. In ascertaining a proper measure of recovery, it is competent to show the expectancy of the husband, for this will, of course, have a material bearing on the amount recover-

¹ *Blake v. Railway Co.*, 10 E. L. & Eq. 443; *Needham v. Railway Co.*, 38 Vt. 294; *St. Louis, I. M. & S. Ry. Co. v. Needham*, 10 U. S. App. 339, 3 C. C. A. 129, 52 Fed. Rep. 371; *Haug v. Great Northern Ry. Co.* (N. D.), 77 N. W. Rep. 97.

² *Illinois Cent. R. R. Co. v. Barron*, 5 Wall. 90.

³ *Conant v. Griffin, Adm'r*, 48 Ill. 410; *Cowden v. Wright*, 24 Wend. 429.

⁴ *Smalling v. Kreech* (Tenn. Ch. App.), 46 S. W. Rep. 1019.

⁵ *Brown v. Chicago & N. W. Ry. Co.* (Wis.), 77 N. W. Rep. 748.

able by reason of the loss of support, etc.; also his present and probable future earnings; ways in which his earnings might be invested to a profit,—all of which should be considered by a court or jury in the light of good common sense, intelligence, fairness and conservatism. There is no fixed amount which may be arrived at by an unbending mathematical calculation; the object and purpose of the law being to ascertain, as near as may be, with these guides, the value of the support and pecuniary expectation of which the wife is deprived by reason of the death.¹ To this end the standard tables of mortality are always admissible in evidence to assist the jury in arriving at a proper and, as near as may be, correct determination of the amount recoverable.²

§ 220. Right of widow to recover for death of husband — Lord Campbell's Act — Necessary allegations.—The statutes giving the wife a right to compensation for the death of her husband by the act of another, which may be sued for by the legal representatives to the use of the widow and next of kin, are not designed to enlarge the assets of the deceased husband. They are enacted only for the use of the persons who are authorized by them to receive compensation for the wrong. Consequently, where the statute provides that the legal representatives of the husband may recover for his death in right of the widow and next of kin, there must be an averment and proof that there is either a widow or next of kin.³ Otherwise, a complaint seeking relief of this kind would be vulnerable to demurrer.

§ 221. Necessaries — Definition.—Ordinarily, all articles of dress, food, articles of household and domestic convenience, usefulness and necessity, such as would be proper for the station, tastes, standing and financial ability of the husband and wife, would be regarded in law as necessaries. And these may be

¹ *St. Louis, I. M. & S. Ry. Co. v. Needham*, 10 U. S. App. 339, 3 C. C. A. 129, 52 Fed. Rep. 371; *Illinois Cent. R. R. Co. v. Barron*, 5 Wall. 90; *Vicksburg & M. R. R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. Rep. 1; *Brunswig v. White*, 70 Tex. 504, 8 S. W. Rep. 85.

² *Sauter v. New York Cent. R. R. Co.*, 66 N. Y. 50; *Central R. R. Co. v.*

Richards, 62 Ga. 306; *Vicksburg & M. R. R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. Rep. 1.

³ *Chicago & R. I. R. R. Co. v. Morris*, 26 Ill. 400; *Safford v. Drew*, 3 Duer, 627; *Lucas v. Central R. R. Co.*, 21 Barb. 425; *Conant v. Griffin*, 48 Ill. 410; *Schwartz v. Judd*, 28 Minn. 371.

furnished the wife by a stranger in the event the husband should fail or refuse to do so, and he will be liable therefor. It is not everything, however, that is merely suitable for the wife that may be within the term "necessaries." It must not only be suitable, but necessary as well.¹ A husband is generally liable for clothing for his wife suitable to her station, and for expense of making same.² And money to an amount commensurate with the necessities of the wife may be furnished her by a stranger for the purchase of necessities to which she is entitled, and the same will be chargeable to the husband if he fails to properly supply his wife with the necessities himself.³ In order to permit a creditor who has thus loaned money to the wife, which has been by her applied to the purchase of necessities at various places, it is not necessary to bring an action for every purchase, but the aggregate of the purchases so made with the borrowed money may be sued for by the lender in one action.⁴ But where a person lends money to the wife to buy necessities, he cannot recover from the husband therefor if the wife should appropriate it to any other purpose. He must see, at his peril, that she makes proper use of it.⁵ It makes no difference, so far as the liability of the husband in all these cases is concerned, that the wife have a separate income. His duty to furnish her necessities does not in any sense depend upon her lack of a separate income or estate.⁶ The services of a physician, in the sickness of the wife, is always regarded as a necessity, and properly so.⁷ The term "necessaries" includes a proper shelter or place of residence;⁸ and it has been held to include instruction.⁹

¹ *Dolan v. Brooks*, 168 Mass. 350, 47 N. E. Rep. 408. And see *Ness v. Singer Mfg. Co.* (Minn.), 70 N. W. Rep. 1126.

² *Hardenbrook v. Harrison*, 11 Colo. 9, 17 Pac. Rep. 72.

³ *Davidson v. Wood*, 1 De Gex, J. & S. 465; *Jenner v. Morris*, 3 De Gex, F. & J. 45; *Farris v. Lee*, 1 P. Wms. 482; *Deare v. Soutten*, L. R. 9 Eq. 151; *Pomeroy*, Eq. Jur., § 1299; *Kenyon v. Harris*, 47 Conn. 510; *Reed v. Crissey*, 63 Mo. App. 184.

⁴ *Kenyon v. Farris*, 47 Conn. 510.

⁵ *Marshal v. Perkins* (R. L.), 37 Atl. Rep. 301.

⁶ *Davidson v. Wood*, 3 De Gex, J. & S. 465.

⁷ *Spaun v. Mercer*, 8 Neb. 357, 1 N. W. Rep. 245; *Harris v. Lee*, 1 P. Wms. 483; *Reed v. Crissey*, 63 Mo. App. 184; *Carpenter v. Hazelrigg* (Ky.), 45 S. W. Rep. 666; *Murdy v. Skyles*, 101 Iowa, 549, 70 N. W. Rep. 714.

⁸ *Reed v. Crissey*, 63 Mo. App. 184; *Oltman v. Yost*, 62 Minn. 261, 64 N. W. Rep. 564.

⁹ *Reed v. Crissey*, 63 Mo. App. 184; *St. John's Parish v. Bronson*, 40 Conn. 75.

That the husband really has not the means with which to furnish his wife the necessities she actually needs does not do away with nor in any way modify his liability, nor will this excuse him for a failure to furnish the same.¹ Burial garments and proper funeral expenses have been held within the term "necessaries," where the wife had small means and had been forced to live apart from her husband by his fault and cruel conduct toward her.² But the contrary is held in Massachusetts, where the wife has a separate estate out of which the funeral expenses might be paid.³ The wife is not liable in any event for the funeral expenses of her husband, as she is under no legal duty to furnish him with the necessities of life, nor, consequently, for the cost of giving him a fitting resting place after death. This being true, if the wife should advance the expenses necessary for this purpose out of her own estate, she would have a right of action against the legal representatives of the husband to recover it from his estate.⁴

§ 222. Liability of husband for necessities of wife — General rule.— By virtue of the relation of marriage the husband becomes liable in law for all the proper necessities of his wife. As a general rule, business cares require his attention in looking after his duties in making a proper support for his wife and family. The matter of looking after the household and family necessities naturally falls chiefly upon the wife, and unless the husband furnishes her these necessities in a manner in keeping with his ability and surroundings, the wife may buy them on the credit of the husband, and the tradesman or other person thus dealing with the wife will have a right of action at law against the husband for the necessities thus furnished.⁵ This

¹ *Furth v. Furth* (N. J. Eq.), 39 Atl. Rep. 128.

² *Scott v. Carothers*, 17 Ind. App. 673, 47 N. E. Rep. 389; *Sears v. Gidday*, 41 Mich. 590, 2 N. W. Rep. 917.

³ *Constantinides v. Walsh*, 146 Mass. 281, 15 N. E. Rep. 631; *Dolan v. Brooks*, 168 Mass. 350, 47 N. E. Rep. 408.

⁴ *McNally v. Weld*, 30 Minn. 209, 14 N. W. Rep. 895.

⁵ *Hardie v. Grant*, 8 Carr. & P. 512; *Gilman v. Andrus*, 28 Vt. 341; *Kimball v. Keyes*, 11 Wend. 33; *Tod v.*

Stokes, 12 Mod. 244; *Pomeroy*, Eq. Jur., § 1299; *Rumney v. Keyes*, 7 N. H. 571; *Walker v. Loughton*, 31 N. H. 111; *Alna v. Plummer*, 4 Greenl. (Me.) 258; *Hanover v. Turner*, 14 Mass. 277; *Reed v. Crissey*, 63 Mo. App. 184; *Santer v. Scrutchfield*, 28 Mo. App. 150; *Harshaw v. Merryman*, 18 Mo. 106; *Ulrich v. Ulrich*, 68 Conn. 580, 37 Atl. Rep. 393; *Flynn v. Messenger*, 28 Minn. 208, 9 N. W. Rep. 759; *McClary v. Warner*, 69 Ill. App. 223; *Israel v. Silsbee*, 57 Wis. 222, 15 N. W.

liability is so firmly fixed in the policy of the law that it does not yield even to infancy. An infant husband, therefore, is liable for the support and necessities of his wife, though the law protects him from liability on his contracts generally.¹ The husband is liable for the support of his wife, even though she commit adultery. If he wishes to free himself from this duty he must then repudiate his wife, and proceed to have the marriage dissolved by a court of competent jurisdiction. The mere existence of the ground for a divorce will not suffice to shield him from the liability for necessities.² It is immaterial that the wife, when entitled to buy necessities on the credit of her husband, buy same with this express understanding. She has a right to support at the hands of her husband, and if he fails or refuses to furnish this, his liability for necessities for his wife arises by operation of law, and the person extending the credit has the legal right to look to the husband for pay.³ But in any case, before there can be a right of recovery, the tradesman furnishing the necessities must sell the same to the wife with the intention of binding the husband. If he extend credit to her alone or personally, this will preclude the idea of a contract upon the faith of the liability of the husband and he will not be bound.⁴ The law generally presumes, however, when nothing is agreed upon as to whether the necessities are to be charged to the wife or the husband, that the intention is to look to the latter.⁵ But this presumption is only one of fact, and, of course, may be overcome by proof to the contrary.⁶ The remedy in all such cases is in the law courts. Equity does not entertain jurisdiction.⁷ Where the law makes the husband liable for the necessities of his wife, it is contrary to public policy to permit him to escape this liability by entering into a contract with his wife that he shall not be liable.⁸

Rep. 144; Gerhold v. Wyss, 13 Neb. 90, 20 S. Rep. 346; Jones v. Gutman 12 N. W. Rep. 811; Benton v. Benton (Md.), 41 Atl. Rep. 792.
(Cal.), 55 Pac. Rep. 152.

¹ Commonwealth v. Graham, 157 Mass. 73, 31 N. E. Rep. 706. See, too, People v. Todd, 61 Mich. 234, 28 N. W. Rep. 79.

² State v. Tierney (Del.), 39 Atl. Rep. 774.

³ Rumney v. Keys, 7 N. H. 571.

⁴ Gafford v. Dunham, 111 Ala. 551,

⁵ Chester v. Pierce, 33 Minn. 370, 23 N. W. Rep. 539.

⁶ Chester v. Pierce, 33 Minn. 370, 23 N. W. Rep. 539; Van Diver v. Buckley (Miss.), 1 S. Rep. 633.

⁷ Margarum v. Margarum (N. J. Eq.), 41 Atl. Rep. 357.

⁸ Silverman v. Silverman, 140 Mass. 560, 5 N. E. Rep. 639. And see Raw-

§ 223. Liability of husband for necessities — Extent of. While the husband ought to provide his wife with the comforts and necessities of life as far as he consistently can, yet the law does not compel him to humor her fancy immoderately, nor to practice needless or improper extravagance in supplying her with the things usually necessary to subsistence and comfort in life. When the husband has, in good faith, supplied his wife with the things most needed, and this is properly in keeping with his surroundings, he has fulfilled his full duty, and the law requires him to go no farther.¹ It may be difficult sometimes to say just how far the husband should go, or to fix a limit beyond which he need not go. In fact, no set rule which will apply to and govern all cases can be formulated, nor has this ever been attempted. The solution of the question depends upon the solution of a question of fact, just like all other issues where the question of fact must necessarily control, and the correct result depends upon intelligently arriving at the fact. This must be done by taking into consideration the station, surroundings and ability of the husband. From these and like considerations his liability or non-liability must be determined as a question of fact, having for a guide the rule that he must support his wife in keeping with his and her surroundings and necessities, within reasonable and proper bounds, not in unnecessary or improper luxury or extravagance.² Under this rule it is held that a husband is not bound to furnish religious instruction for his wife.³ Nor is costly jewelry within the term.⁴

§ 224. Necessaries — Husband may direct and manage the furnishing of same.— While the wife may have the right to purchase necessities for herself on the credit of her husband when he fails or refuses to properly furnish same, yet he has the right to furnish these under his own direction and control.

son v. Spangler, 62 Iowa, 59, 17 N. W. Rep. 173.

¹ Hudson v. Sholem, 65 Ill. App. 61.

² Lane v. Ironmonger, 13 M. & W. 366; Emmett v. Norton, 8 Car. & P. 506; Hall v. Weir, 1 Allen (Mass.), 261; Chamberlin v. Company, 10 Allen (Mass.), 539.

³ St John's Parish v. Bronson, 40 Conn. 75. In this case it was held that the husband was not liable for pew rent for his wife in order that she might attend divine services.

⁴ Alto v. Matthie, 70 Ill. App. 54.

He may reasonably designate the place where they may be had, or designate another to furnish same. And when he has designated others to look after this for him, the wife will have no right to buy elsewhere on the credit of the husband, unless the husband and those by him designated to afford the necessities fail to do this. And if a stranger furnish the wife supplies when they are thus available, he can only look to her for his pay, where he knew or should have known that the same could have been had elsewhere under the direction of the husband.¹ Of course if the arrangements made by the husband fail, the wife may buy necessities at his expense, unless he furnish them otherwise.² But if the husband himself is willing, able and ready to furnish his wife with necessities, and notifies others not to furnish the same, they cannot, after ignoring his notice thus given, recover from him for anything furnished her, for to permit this would license strangers to disregard express notice and caution.³

§ 225. Necessaries — Liability of husband where he deserts his wife.— As the law enjoins upon the husband the duty of love, maintenance and protection of his wife, it is clear that he cannot, and should not be permitted to, evade this sacred duty by deserting or abandoning her. He is liable in law, therefore, for these things, when he deserts her without lawful cause, just as he was before the desertion.⁴ And though the wife persists in a continuation of adultery for which the husband renounces her, a tradesman selling her necessities without notice of her misconduct can hold the husband for the same.⁵ This has been held to be the rule even though the husband had previously been guilty of adultery on his part and turned his wife from his door.⁶

§ 226. Necessaries — Remedy of stranger who furnishes wife money to buy.— Where a third person furnishes the wife

¹ Kimball v. Keyes, 11 Wend. 33; Jenner v. Morris, 3 De Gex, F. & J. 43; Pidgin v. Cram, 8 N. H. 350; Nurse Walker v. Loughton, 31 N. H. 111; v. Craig, 5 B. & P. 148. Bolton v. Prentice, 2 Str. 1214; Robinson v. Grenald, 1 Salk. 119.

² Pidgin v. Cram, 8 N. H. 350; Nurse v. Craig, 5 B. & P. 148.

³ Segelbaum v. Ensminger, 117 Pa. St. 248, 10 Atl. Rep. 759.

⁴ Kenyon v. Farris, 47 Conn. 510;

⁵ Norton v. Fazan, 1 B. & P. 225; Manwairing v. Sands, 2 Str. 706; Morris v. Martin, 1 Str. 647.

⁶ Gavier v. Hancock, 6 T. R. 803.

with money to buy necessities, which money is so applied by the wife, his right to recover is of an equitable nature and rests, in part, at least, upon the idea of subrogation. The lender becomes, in a sense, subrogated and substituted to the rights of the seller; that is, to such rights as the seller would have had had the sale been made to the wife on the credit of the husband instead of with the funds furnished her by a stranger to procure the necessities. The lender then has the same right to resort to the husband for the amount of the loan that the seller would have had had he sold on a credit. It amounts to a furnishing by the lender in an indirect way, by reason of which, in equity, though not at law, the husband will become liable to the lender.¹

§ 227. Necessaries — Separation by consent — Liability of husband.—The husband cannot shield himself from the duty imposed upon him by law to properly care for his wife by her consent to a separation. But if they separate by mutual agreement, and the husband allows the wife a certain sum, either in bulk or instalments, sufficient for her necessities, this will absolve the husband from any further liability where the dealer sells to the wife with notice, either actual or constructive, of the facts.² The husband is not only liable for the necessities of his wife while she is living apart from him by mutual consent, but also for the necessities of his infant children whom he permits to live with her.³ And while they thus live apart, a tradesman has no right to furnish the wife necessities on the faith of the liability of the husband until he has failed or refused to furnish the same or have it done.⁴ Of course, the rule is different where the husband and wife are living together; for, when this is true, it is presumed that the husband sanctions or authorizes the purchase by the wife of proper necessities.⁵ If

¹ Deare v. Soutten, 9 L. R. Eq. Cas. 151, overruling May v. Skey, 16 Sim. 588; Kenyon v. Farris, 47 Conn. 510; Harris v. Lee, 1 P. Wms. 483; 3 Pomerooy, Eq. Jur., § 1299.

² Todd v. Stokes, 1 Ld. Raym. 444; Walker v. Loughton, 31 N. H. 111; McKinney v. Guhman, 38 Mo. App. 344; Emmett v. Norton, 8 Car. & P. 506; Devendorf v. Emerson, 66 Iowa, 698, 24 N. W. Rep. 515.

³ Walker v. Loughton, 31 N. H. 111; Rumney v. Keys, 7 N. H. 571; McKinney v. Guhman, 38 Mo. App. 344.

⁴ Olson v. Youngquist (Minn.), 75 N. W. Rep. 727; Bergh v. Warner, 47 Minn. 250, 50 N. W. Rep. 77.

⁵ Wagner v. Nagel, 33 Minn. 348, 23 N. W. Rep. 308; Bergh v. Warner, 47 Minn. 250, 50 N. W. Rep. 77; Flynn v. Messenger, 28 Minn. 208, 9 N. W. Rep. 759.

the wife, therefore, hire a servant to do domestic work, the law presumes, in the absence of a contrary showing, that she had authority, either express or implied, to do so upon the liability of her husband.¹

§ 228. Rule where wife renounces her relationship.— While the husband may be liable for necessities furnished his wife whom he has wrongfully driven from his door, or otherwise neglected to properly provide for, yet he is not liable for such when furnished her by a stranger after she has renounced or repudiated her marital relation or duties.² So, where a wife elopes with another, this is a renunciation of the marriage, in assuming a relation with another which is inconsistent and incompatible with such a relation with her husband. By such an act the wife places herself in the position by her own fault, and she cannot with good grace expect him to continue to hold himself liable for her support. She not does deserve same, and the law does not require that she have it.³ And when a tradesman furnishes a wife with necessities while she is by him known to be living apart from her husband, the burden is on him to show that she is thus living by reason of the fault of the husband before he can recover.⁴ If her conduct be such as to preclude her from the right to require her husband to support her, and this is known to the tradesman, he cannot, of course, recover from the husband.⁵ It seems that it is otherwise where the tradesman is ignorant of the facts and acts in good faith.⁶

§ 229. Necessaries — Liability of husband where he drives his wife from home.— The husband, so long as the marriage relation exists, as a general rule, is bound to furnish his wife

¹ *Wagner v. Nagel*, 33 Minn. 348, 23 N. W. Rep. 308.

² *Child v. Hardyman*, 2 Str. 875; *Todd v. Stokes*, 12 Mod. 244; *Etherington v. Parrot*, Ld. Raym. 1006; *Walker v. Loughton*, 31 N. H. 111; *Morris v. Martin*, 1 Str. 647; *Hindley v. Westmeath*, 6 Barn. & C. 200; *McCutcheon v. McGahay*, 11 Johns. 281; *Emmett v. Norton*, 8 Car. & P. 503; *Vanuxen v. Rose*, 7 Ind. 222.

³ *Robinson v. Grienald*, 1 Salk. 119.

⁴ *Mainwaring v. Leslie*, 2 Car. & P. 507; *Rumney v. Keys*, 7 N. H. 571, 578; *Hindley v. Westmeath*, 6 Barn. & C. 200, 211; *McKinney v. Guhman*, 38 Mo. App. 344; *Santer v. Scrutchedfield*, 28 Mo. App. 150; *Rostick v. Brower*, 22 Misc. Rep. 709, 49 N. Y. S. 1046; *People v. Pettit*, 74 N. Y. 320.

⁵ *Segelbaum v. Ensminger*, 117 Pa. St. 248, 10 Atl. Rep. 759.

⁶ *Vanuxen v. Rose*, 7 Ind. 222.

with the necessities of life to the extent that it is necessary and reasonably within his power and means. And this liability does not cease though the wife leave the husband and seek an asylum with others, where the husband drives her from his home and shelter, or his conduct towards her is such as to make a dwelling with him intolerable. He cannot escape his legal duty to provide for her by violating his duty to make his home habitable. And whenever the wife is thus driven to the necessity of finding a more congenial shelter, the law attends her with a letter of credit from her husband authorizing her to buy, as far as necessary, from any she may, all the necessities of life fitting her condition and surroundings, and fixes a liability upon him therefor.¹

§ 230. Liability of husband for necessities in case of desertion.—The very substructure of the liability of the husband for the necessities of his wife enjoined by law is found largely in his recognized right to have and enjoy the society, comfort, love and respect of his wife, as well as her reasonable obedience to his proper requirements. But when the wife, renouncing and repudiating her marital duties, without fault on the part of her husband, abandons or deserts him in violation of her duty and the fealty she owes him, neither she, nor third parties with notice, actual or constructive, can require him to contribute in the smallest part to her support.² But the rule is very different where the husband deserts the wife without such fault on her part as will warrant his abandonment of her; for the law will not permit him to divest himself of a legal liability by an act itself forbidden by law. So, if the husband

¹ Reynolds v. Sweester, 15 Gray (Mass.), 78; Gilley v. Gilley, 79 Me. 292, 9 Atl. Rep. 623; Dennis v. Clark, 2 Cush. (Mass.) 347, 353; Hall v. Weir, 1 Allen (Mass.), 261; Emmett v. Norton, 8 Car. & P. 506; Camerlin v. Company, 10 Allen (Mass.), 539; Dumain v. Gwynne, 10 Allen (Mass.), 270; Ratch v. Miles, 2 Conn. 638; Eiler v. Crull, 99 Ind. 375; Watkins v. De Armond, 89 Ind. 553; M'Cutchen v. M'Gahay, 11 Johns. 281; Etherington v. Parrott, 2 Ld. Raym. 1006; Thomp-

son v. Hervey, 4 Burr. 2177; Arnold v. Brandt, 16 Ind. App. 169, 44 N. E. Rep. 936; Litson v. Brown, 26 Ind. 489; Rawlyns v. Van Dyke, 3 Esp. 250; Stanton v. Wilson, 3 Day (Conn.), 37; Hodges v. Hodges, 1 Esp. 441; Hancock v. Merrick, 10 Cush. (Mass.) 41.

² Etherington v. Parrott, 2 Ld. Raym. 1006; M'Cutchen v. M'Gahay, 11 Johns. 281; Lapworth v. Leach, 79 Mich. 16, 44 N. W. Rep. 838.

culpably abandons his wife, she may still purchase necessities for herself and infant children, and for these the law firmly fixes upon the husband a liability.¹ Ordinarily, the husband is not liable for any necessities furnished his wife where she has, of her own accord and without fault on his part, left his bed and board, and where the person furnishing same is aware of the facts, or should be. But if the husband is guilty of such cruel or intolerable treatment towards his wife that she cannot live with him in peace or safety, she may go elsewhere, and buy necessities suitable to her station upon his credit.² Though the wife may have voluntarily left her husband without fault on his part, while he would not be liable for her necessities during the time she should thus absent herself from him, yet, if she offer to return and resume her marital duties towards him, he will thereafter be liable, if she has been guilty of no immorality or conduct entitling the husband to a divorce.³

§ 231. Right to become partners under modern statutes. Whether or not the husband and wife may associate themselves together for ordinary business partnership purposes is a difficult question. It is one upon which the most learned courts are at variance, and while the lack of harmony is perhaps traceable to some extent to the different wording of the various statutes clothing married women with contractual powers, yet this is not wholly the case, for courts differ upon the same question, and judges of the same court differ among themselves. A correct solution will be attempted, but this is attended with grave difficulties. In a recent Maine case⁴ the court discusses the question in a very learned and elaborate opinion, citing

¹ Hardy v. Eagle, 23 Misc. Rep. 441, 51 N. Y. S. 501; Bostick v. Brower, 22 Misc. Rep. 709, 49 N. Y. S. 1046.

² Stanton v. Wilson, 3 Day (Conn.), 37. But in such case it is held that the husband is not liable for the education of his children provided at the expense of a third person at the instance of the wife. Such acts of the husband towards the wife alone do not operate necessarily to bestow upon her the care, custody and control of the infant children. But a

husband who permits his children to live with his wife, who is maintaining a state of separation from him, will be liable for necessities furnished them. Rawlings v. Van Dyke, 3 Esp. 250; Kimball v. Keyes, 11 Wend. 33.

³ Robinson v. Grienald, 1 Salk. 119; Etherington v. Parrott, Ld. Raym. 1006.

⁴ Haggett v. Hurley (Me.), 40 Atl. Rep. 561.

many authorities, and reaching the conclusion that a wife cannot enter into a contract of partnership with her husband under the statutes of that state. But these statutes provide that a married woman shall be liable upon debts contracted in her own name only, and it is clear that a partnership debt is not such an obligation, for that is necessarily in the names of the partners; at least the legal effect is the same, for the law makes all partners liable for the firm debts. In Kentucky a married woman, by certain proceedings, may be authorized to trade, sue and be sued as a *feme sole*. Under this statute it is held that she may make a contract of partnership with her husband and thereby bind her separate estate for the payment of the partnership debts.¹ A like conclusion is reached in New York under a statute providing that a married woman may carry on any trade or business on her own account.² And a like ruling is made by the supreme court of Vermont under a similar statute in that state.³ Substantially similar rulings under statutes more or less alike will be found in other jurisdictions, announced by courts of the highest learning and ability.⁴ On the other hand, it has been held in Michigan that the wife is not liable on a joint contract executed by herself and husband with reference to an estate held by entirety.⁵ It is also held squarely in this state that the husband and wife, under local statutes authorizing the wife to deal with her own property as a *feme sole*, cannot form a valid partnership.⁶ And if a single man and woman engage in a partnership, their subsequent marriage will operate, *ipso facto*, to dissolve the firm.⁷ That husband and wife cannot make a partnership contract is intimated in Ohio, though the question was not before the court, and the suggestion

¹ Louisville & N. R. R. Co. v. Alexander (Ky.), 27 S. W. Rep. 981.

² Suan v. Caffé, 42 Hun, 658; affirmed, 122 N. Y. 808, 25 N. E. Rep. 488. And see, to like effect, Scott v. Conway, 58 N. Y. 619; Burney v. Savannah Gro. Co., 98 Ga. 711, 25 S. E. Rep. 915; Ellis v. Mills (Ga.), 27 S. E. Rep. 740.

³ Lane v. Bishop, 65 Vt. 575, 27 Atl. Rep. 499.

⁴ Schofield v. Jones, 85 Ga. 816, 11 S. E. Rep. 1032; Reiman v. Hamil-

ton, 111 Mass. 245; Toof v. Brewer (Miss.), 3 S. Rep. 571; Krouskop v. Shontz, 51 Wis. 204, 8 N. W. Rep. 241.

⁵ Spier v. Opfer, 73 Mich. 35, 40 N. W. Rep. 909; Curtis v. Crowe, 74 Mich. 99, 41 N. W. Rep. 876.

⁶ Artman v. Ferguson, 73 Mich. 146, 40 N. W. Rep. 907; Feige v. Babcock (Mich.), 70 N. W. Rep. 7; Chamberlain v. Murrin, 92 Mich. 362, 52 N. W. Rep. 640.

⁷ Bassett v. Shepardson, 52 Mich. 3, 17 N. W. Rep. 217.

cannot be considered of greater force than mere *dicta*.¹ The Massachusetts court of last resort comes to the same conclusion under the statutes of that state.² And the conclusion of the Indiana court is the same.³ But this court grounds its decision upon the rule as announced by the Massachusetts court, having supposed that the New York cases sustained the theory that a husband and wife could not form a partnership. But when the Indiana decision was rendered, the well-considered case of *Suan v. Caffé*⁴ had not been announced. What would have been the conclusion of the learned Indiana court with this case to guide it must be left to conjecture. But there is one point upon which there seems to be no controversy under these statutes, and that is that a married woman may form a binding partnership with any person other than her husband.⁵

But on the direct question whether a partnership between husband and wife is valid or not, the conflict of authority is bewildering. Hampered by this serious conflict, perhaps, the true rule can best be found with principle, rather than authority, for a guide. The reason of the law is the life of the law. And whenever a proposition is asserted which has not reason for its support, it is not entitled to any unyielding sanction, even though supported by authority. It is believed that the most learned, lucid, forceful and logical reasoning upon the point will be found in the opinions sustaining the theory that a wife may make a binding contract of partnership with her husband the same as she could with any one else. And the New York court of appeals, in sustaining this contention, makes use of the following chosen language: "Partners are the agents of each other, and are jointly and severally liable for the debts of the firm; these being two of the essential elements of a contract of partnership. It being settled that husbands and wives may be the agents of each other, and that they may bind themselves by joint contracts entered into with third persons, we see no warrant in the statute for exempting them from liability to

¹ See *Payne v. Thompson*, 40 Ohio St. 192, 5 N. E. Rep. 654.

² *Plumer v. Lord*, 7 Allen (Mass.), 481; *Bouker v. Bradford*, 140 Mass. 521, 5 N. E. Rep. 480.

³ *Haas v. Shaw*, 91 Ind. 384. And see, to the same effect, *Gilkerson-*

Sloss Commission Co. v. Salinger, 56 Ark. 294, 19 S. W. Rep. 747.

⁴ 122 N. Y. 308, 25 N. E. Rep. 488.

⁵ *Newman v. Morris*, 52 Miss. 402; *Toof v. Brewer* (Miss.), 8 S. Rep. 571; *Abbott v. Jackson*, 43 Ark. 212.

creditors for debts incurred by firms of which they are members. . . . Upon principle and authority, we think that when husband and wife assume to carry on a business as partners, and contract debts in the course of it, the wife cannot escape liability on the ground of coverture.”¹ The husband must naturally have a lively interest in the welfare and success of his wife whenever she embarks in an undertaking on her own responsibility. Her welfare is, in a sense, his welfare, and he would naturally strive to bring about the success of a partnership of which both might be members. He would not be so apt to defraud his wife as would a stranger. The interests of the husband and wife are largely identical. What is a benefit to one is, usually, a benefit to the other, either directly or indirectly. And it is believed that the thoughtful and intelligent reader

¹ *Suan v. Caffé*, 122 N. Y. 308, 25 N. E. Rep. 488. In connection with this case the language of Judge Hemingway, speaking for himself and Judge Battle, in an able and convincing dissenting opinion in the case of *Gilker-son-Sloss Com. Co. v. Salinger*, 56 Ark. 294, 19 S. W. Rep. 747, will be found interesting and, no doubt, instructive. The learned jurist, among other things, said: “I am of the opinion that, under the constitution and laws of Arkansas, a married woman is, as to her separate personal property, clothed with all the powers of a single woman; that she may make contracts in reference to it with her husband or with others, binding upon her in law, just as though she were single; that she may be sued upon said contracts in a court of law, where the action is otherwise properly cognizable in law; and that since it is settled that she may engage in business as a partner with others than her husband, it follows, from exactly the same reasons, that she may embark her property or services in a partnership with him. My reasons, in brief, are that whatever law can be appealed to as authorizing her to form a partnership with any person is without limitation

or restriction as to the person with whom she may form it; and that as it confers a power without restriction in that respect, it can be held to exclude the husband only by a system of judicial construction which seems to me to be legislation,—and that toward restraining the power vested under an act which is highly remedial. At common law a married woman had no power to make a valid contract with her husband or with anybody else. Her disability was general, and whatever power she now has must be found in the statutes. They authorize her to bargain, sell, assign and transfer her separate personal property, and carry on any trade or business and perform any labor or services on her sole and separate account. This has been held as authorizing her to make contracts and enter into partnerships; and how can it be said that the right is given to be exercised as to one person and not as to another, I do not comprehend. By its terms it extends to dealings as much with one person as another; and if it exists at all, it exists generally as to all persons, unless the courts limit a power which came from the legislature unlimited.”

will look in vain for a satisfactory reason to support the contention that a married woman may enter into a business partnership with every other person in the world except her husband.

§ 232. Wife bound by estoppel.— Under statutes practically emancipating the wife as to the power to contract, she may become bound by an estoppel arising upon her representation or act, where, if the same were true, it would make her liable in her separate estate. It is not the purpose of the law, in emancipating her, to place in her hands a sword with which she may injure others.¹ So, where a married woman conveys land, and afterwards sues to foreclose her vendor's lien, and prosecutes same to judgment, under which the land is condemned by the court and sold to satisfy same, and the proceeds of the sale thus realized are paid to and accepted by the wife, she will not be heard for any purpose to set up the invalidity of the deed which she executed.² Likewise, where the husband makes an unauthorized sale of land for his wife, and she, with knowledge of all the facts, sues for the purchase-money due according to the terms of the sale, she will thereby be estopped to repudiate it or deny the authority of the husband to make it in her behalf.³ As a rule, in the case of a married woman, her mere silence or inaction alone will not amount to an estoppel. She must do some positive act or make some assurance which is relied upon by the person seeking to set up the estoppel before she will be precluded from asserting any right.⁴ She is not estopped to set up title to realty in opposition to the warranty in the deed of her husband, though she may have joined as wife for the purpose of releasing her dower or like interest, as she is not liable upon nor bound by the covenants

¹ *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. Rep. 565; *Ward v. Berkshire Ins. Co.*, 108 Ind. 301, 9 N. E. Rep. 361; *Orr v. White*, 106 Ind. 344, 6 N. E. Rep. 909; *Hollingsworth v. Hill* (Ala.), 22 S. Rep. 460; *Bien v. Heath*, 6 How. (U. S.) 228; *Dunbar v. Mize*, 53 Ga. 439; *Dotterer v. Pike*, 60 Ga. 42; *Archer v. Guill*, 67 Ga. 195; *Ruffin v. Paris*, 75 Ga. 654; *Henry v. McAlister*, 99 Ga. 557, 26 S. E. Rep. 469; *Wolff v.*

Hawes (Ga.), 31 S. E. Rep. 425. And see *Chilton v. Lyons*, 2 Black (U. S.), 458; *Slaughter v. Glenn*, 98 U. S. 242.

² *Rawley v. Burris* (Tenn. Ch.), 47 S. W. Rep. 176.

³ *Scales v. Johnson* (Tex. Civ. App.), 41 S. W. Rep. 828. And see *Morris v. Turner*, 5 Tex. Civ. App. 712, 24 S. W. Rep. 959.

⁴ *Paul v. Kunz* (Pa.), 41 Atl. Rep. 610.

of warranty in the deed of her husband.¹ Nor is she estopped to show that a note executed by her, and purporting to bind her own estate, and to be for the benefit thereof, is really for an indebtedness owing by her husband or a stranger.² But it seems the rule is otherwise where a third party has become the owner of the note for value before maturity without notice of any equities or defenses.³ But in no case can a married woman estop herself by a contract which she has no legal capacity to make. Of her legal disabilities all must take notice at their peril and abide the law governing same. Strangers dealing with a married woman have no right to assume that she can bind herself by an act which the law positively forbids her to do.⁴

§ 233. Partition of estate in coparcenary — Rights of wife.— At common law the general rule is, coparceners may make partition of their lands by parol or by deed, the latter, of course, being preferable.⁵ But a parol agreement of this kind, to be valid, must be executed. The parties must act upon its stipulations.⁶ In making partition of realty thus held, where a husband was interested, the wife might, after his death, by showing that the part received by her husband was of less value than the part he was equitably and fairly entitled to, have the division annulled, and she or her heirs could claim such a part as should have been awarded in the partition.⁷ But the unequal partition would be voidable only, and not absolutely void. If the wife who is entitled to complain should elect to accept the portion, she would be bound by the election, and no others could complain.⁸ And the partition, to be effect-

¹ Hughes v. Torrence, 111 Pa. St. 611, 4 Atl. Rep. 825.

² Kilbourn v. Brown, 56 Conn. 149, 14 Atl. Rep. 784.

³ Lane v. Schlemmer, 114 Ind. 296, 15 N. E. Rep. 454.

⁴ Matthews v. Murchison, 17 Fed. Rep. 760; Daniels v. Mason, 90 Tex. 240, 38 S. W. Rep. 161; Drewry v. Foster, 2 Wall. 24; Hickey v. Thompson, 52 Ark. 234, 12 S. W. Rep. 475; Rogers v. Brooks, 30 Ark. 612. And see Stivers v. Tucker, 126 Pa. St. 74, 17 Atl. Rep. 541.

⁵ Jones' Devisees v. Carter, 4 Hen. & M. (Va.) 184, 190; Bolling v. Teel, 76 Va. 487; Yancey v. Radford, 86 Va. 638, 10 S. E. Rep. 972; Brooks v. Hubble (Va.), 27 S. E. Rep. 585; Bryan v. Stump, 8 Gratt. (Va.) 241.

⁶ Snively v. Luce, 1 Watts (Pa.), 69; Woodbeck v. Wilders, 18 Cal. 131.

⁷ Jones' Devisees v. Carter, 4 Hen. & M. (Va.) 184, 190; Brooks v. Hubble (Va.), 27 S. E. Rep. 585; 6 Lawson, Rights, Rem. & Pr., § 2731.

⁸ Jones' Devisees v. Carter, 4 Hen. & M. (Va.) 184, 190.

ive, must be assented to by all parties having an interest in the land such as would entitle them to assert the right of partition.¹ But the coverture of the wife does not invalidate the partition where the husband has knowledge of all the facts and gives his consent.²

§ 234. **Right of husband to rents and profits of wife's realty.**—At common law the husband became, by virtue of the marriage and operation of law, at once entitled to the uses, rents and profits of all the lands of his wife.³ This interest which a husband takes in the lands of his wife at common law is a freehold estate, and may, during the coverture, be conveyed by the husband just as may any other life estate.⁴ Of course, when the coverture should cease, there would be no interest for him to convey, and the right, being an incident to the marriage, ceases upon a dissolution thereof *a vinculo matrimonii*, or the death of the wife.⁵ If there should be issue born alive of the marriage, however, and the other requisites exist, the husband would be entitled to the rents and profits after the death of the wife for the term of his natural life; but this tenure would be by virtue of the estate by the curtesy rather than by the right to receive the rents and profits of the lands of the wife during and because of the marriage.⁶ And this right to the rents and profits is not taken away by a statute forbidding a sale of the interest of the wife in her lands to pay the debt of her husband, and disabling the husband from alienating such interest unless the wife joins in the conveyance;⁷ nor by a statute which protects the rents of the lands of the wife from the debts of the husband.⁸ But if the statute authorizes the wife to control, manage and dispose of her separate real estate as though she were unmarried, this rule is destroyed, and the husband has no right to the rents and profits, but the right to

¹ *McConnell v. Carey*, 48 Pa. St. 345.

² *Hardy v. Summers*, 10 Gill & J. (Md.) 316.

³ *Lucas v. Rickerich*, 1 Lea (Tenn.), 726; *Brasfield v. Brasfield*, 96 Tenn. 580, 36 S. W. Rep. 384; 4 Kent, Comm. 130; *Roe v. Smith*, 45 N. Y. 230; *Rose v. Rose* (Ky.), 46 S. W. Rep. 524.

⁴ *Coleman v. Satterfield*, 2 Head (Tenn.), 259.

⁵ *Brasfield v. Brasfield*, 96 Tenn. 580, 36 S. W. Rep. 384; 4 Kent, Comm. 130.

⁶ *Brasfield v. Brasfield*, 96 Tenn. 580, 36 S. W. Rep. 384; 4 Kent, Comm. 130.

⁷ *Taylor v. Taylor*, 12 Lea (Tenn.), 490; *Coleman v. Satterfield*, 2 Head (Tenn.), 259.

⁸ *Ables v. Ables*, 86 Tenn. 333, 9 S. W. Rep. 692; *Brasfield v. Brasfield*, 96 Tenn. 580, 35 S. W. Rep. 384.

the usufruct of the land is exclusively in the wife.¹ And this being true, it follows, of course, that if the husband should misappropriate or convert any funds arising from the rents and profits of the lands belonging to his wife, and coming to him as her agent or otherwise for her or in her right, he will be liable to her therefor.²

§ 235. Wife's earnings — Right to.— At common law there is no difficulty in solving the question who is entitled to the earnings and services of the wife during the coverture. These clearly belong to the husband. But under statutes enlarging her common-law rights the difficulty is greater. These statutes, however, are not construed, as a general rule, so as to enlarge or modify the common-law rule further than is necessary to give proper effect to the statutes. The doctrine seems to be, therefore, that the earnings of a married woman belong to her husband, though the local law may authorize her to act as a sole trader, and contract, sue and be sued with reference to her separate property, where the earnings are not connected with, and do not arise out of, her separate estate or business.³ Not only are such earnings the property of the husband, but any property purchased by the wife with same becomes his, and liable to be resorted to by execution or other process by his creditors for the satisfaction of his debts.⁴ And of course this includes real estate.⁵ If the wife should purchase property in her own name with such funds, she will be decreed to hold it as trustee for her husband.⁶ But a husband who abandons his

¹ *Bridges v. Hanna* (Ky.), 47 S. W. Rep. 218; *Rine v. Hall* (Pa.), 48 Atl. Rep. 1088.

² *Griffith v. Griffith* (Pa.), 41 Atl. Rep. 30.

³ *Connors v. Connors*, 4 Wis. 112; *Switzer v. Valentine*, 4 Duer, 96; *Ryder v. Hulse*, 24 N. Y. 372; *Bolman v. Overall*, 80 Ala. 451, 2 S. Rep. 624; *Gardner v. Connelly*, 75 Iowa, 205, 39 N. W. Rep. 650; *Bailey v. Gardner*, 31 W. Va. 94, 5 S. E. Rep. 636; *Lanham v. Lanham*, 30 W. Va. 222, 4 S. E. Rep. 273; *Cramer v. Redford*, 17 N. J. Eq. 367; *Duncan v. Roselle*, 15 Iowa, 501; *Woodbeck v. Havens*, 42

Barb. 66; Seitz v. Mitchell, 94 U. S. 580; *Merrill v. Smith*, 37 Me. 394; *Hamill v. Henry*, 69 Iowa, 752, 28 N. W. Rep. 32; *Miller v. Dickinson Co.*, 68 Iowa, 102, 26 N. W. Rep. 31; *Goodale v. Frost's Adm'r*, 59 Vt. 491, 8 Atl. Rep. 280; *Bridges v. Howell*, 27 S. C. 425, 3 S. E. Rep. 790.

⁴ *Walker v. Ream*, 36 Pa. St. 410; *Robinson v. Wallace*, 39 Pa. St. 129; *Seitz v. Mitchell*, 94 U. S. 580; *Cramer v. Redford*, 17 N. J. Eq. 367.

⁵ *Cramer v. Redford*, 17 N. J. Eq. 367.

⁶ *Duncan v. Roselle*, 15 Iowa, 501; *Merrill v. Smith*, 37 Me. 394.

wife to neglect, by reason of which she is compelled to labor for her own sustenance, cannot claim the earnings of his wife.¹ As to the earnings of the wife growing out of her separate estate or business, however, the rule is, these are her own to have and dispose of as she may see fit, free from any control or authority of her husband.² And, this being true, she may apply the same, by an executed contract, to the payment of the debts of her husband or a stranger.³

§ 236. Right of husband to an action for enticing away his wife.—The husband has a right of action at common law against any one who allures or entices away his wife. Such an act is a tort for which the law is always ready to afford redress.⁴ The damages recoverable in cases of this kind are such as would be a reasonable and proper compensation to the husband for the loss of the society, comfort and affection of the wife.⁵ And the fact that the father of the wife himself induced her to leave her husband will not defeat the right of action, but merely lessen the damages recoverable; for the presumption, in such instances, is, the parent acted from motives of affection for his child.⁶ Again, in such actions, it is not competent to prove that the husband mistreated his wife. No one has the right to entice a wife from her husband because he may mistreat her.⁷ But if the mistreatment is so flagrant and violent as to menace the personal safety of the wife, any one, and more especially a parent or near relative, may receive the wife into his home and even counsel or advise her to leave her husband. A husband may not make the condition of his wife intolerable and then complain that others assist in procuring her personal safety or counsel her in avoiding him.⁸

¹ Spier's Appeal, 25 Pa. St. 233; Ellison v. Anderson, 110 Pa. St. 486, 1 Atl. Rep. 539.

² Sellmyer v. Welch, 47 Ark. 485, 1 S. W. Rep. 777.

³ Sellmeyer v. Welch, 47 Ark. 485, 1 S. W. Rep. 777.

⁴ Hutcheson v. Peck, 5 Johns. 196; Woods v. Mathews, 47 Iowa, 409, 410; Barnes v. Allen, 30 Barb. 663; Bennett v. Smith, 21 Barb. 439; Shuneman v. Palmer, 4 Barb. 225; Turner v. Estes, 3 Mass. 317; Winsmore v.

Greenbank, Willes, 577; Duberly v. Gunning, 4 T. R. 651; Hadley v. Heywood, 121 Mass. 236.

⁵ Winsmore v. Greenbank, Willes, 577.

⁶ Hutcheson v. Peck, 5 Johns. 196; Bennett v. Smith, 21 Barb. 439.

⁷ Barnes v. Allen, 30 Barb. 663.

⁸ Bennett v. Smith, 21 Barb. 439; Phillips v. Squire, Peake (N. P.), 82; Schuneman v. Palmer, 4 Barb. 225; Hadley v. Heywood, 121 Mass. 236.

§ 237. Right of husband to action for enticing away wife — Necessary to show intent.—In order that a husband may maintain an action for enticing away his wife, it is incumbent upon him to show some evil intent or purpose, or facts from which such intent will necessarily be implied. If the person offending merely give the wife shelter for a time at her request, not intending to detain her against the will of her husband, nor to persuade, counsel or advise her to remain away from him, there is no wrong for which this action will lie.¹

§ 238. Larceny by husband of wife's property.—As the husband at common law became the owner of all the wife's chattels which he reduced to possession during her life-time, he could not be guilty of stealing such property. For upon the taking possession, though by theft, the property became his, and there could be no crime, as he could not steal his own property.² In fact, at common law, with some exceptions, the wife had no personal property. And as realty is not the subject of theft, being immovable, the wife had practically no property under the old law. Having none, it is easy to conceive that the husband could steal none from her.

§ 239. Right of husband to defend wife.—At common law the husband has the right to defend his wife from an assault by a third party, even to the extent of taking life when necessary. The law permits this by reason of the peculiarly confidential relation between them, and their mutual interests and affections.³ This right of the husband to defend his wife is not confined to instances of ordinary assault, but includes also instances of an assault upon the chastity of his wife.⁴ The husband is the lawful head of his family, and the law freely permits him to protect those thus having the right to look to him for protection. Further, his relation to his family makes him the most proper person to give them this protection, as they are entitled to it at the hands of some one.

¹ *Schuneman v. Palmer*, 4 Barb. 260; 1 Wharton, Crim. Law (1896), 222; *Phillips v. Squire*, Peake (N. P.), § 494; *Hale*, P. C. 484; *Staten v. State*, 82; *Turner v. Estes*, 3 Mass. 317. 30 Miss. 619; *Dyson v. State*, 26 Miss.

² *Overton v. State*, 43 Tex. 616. 362.

³ *Handcock v. Baker*, 2 Bos. & Pul. ⁴ *Staten v. State*, 30 Miss. 619.

§ 240. Right of wife to recover for domestic services.— The rule is there is no presumption of an agreement by or upon the part of the husband to pay his wife for such domestic services as she properly renders him in the capacity of wife. For such services the law requires him in return to furnish her with the necessities of life in keeping with his ability. This is upon the principle that denies liability to a child on the part of the parent for services of a domestic nature performed for the parent while the child is under majority and living with the parent receiving support. And this rule of immunity of the husband from liability for such services of the wife holds good though he may have another wife living, by reason of which fact the second marriage is necessarily void.¹ Nor indeed can the wife at common law, either alone in her own name, or jointly with her husband, sue for services rendered to another; for her services belong to her husband, and he alone has the right of action therefor.²

§ 241. Right of husband to action for slander of his wife. The law protects the husband to the fullest extent in the unhampered enjoyment of his wife's society, her virtue and purity, and is quick to fix a liability upon one who wrongfully or falsely slanders his wife, or spreads false reports about her which would bring her into disrepute among neighbors and acquaintances, or tend to do so, to the humiliation, mortification, distress or mental suffering, sorrow and regret of the husband. And whenever this sacred right of the husband to require the good character of his wife to be respected by all is violated, a remedy is given him at law for any and all damages naturally arising from the injury.³ But of course the husband will never be permitted to recover for such an injury where he consents, connives at, or is privy to it.⁴ Though if the husband is merely negligent or thoughtless, but not consenting or conniving, he will not be deprived of his action; but this fact may

¹ Cooper v. Cooper, 147 Mass. 370, 17 N. E. Rep. 892.

² Garretson v. Appleton, 58 N. J. Law, 386, 37 Atl. Rep. 150.

³ Bunnell v. Greathead, 49 Barb. 106; Winter v. Henn, 4 C. & P. 494.

⁴ Duberly v. Gunning, 4 T. R. 651, 657; Bunnell v. Greathead, 49 Barb. 106; Crewe v. Crewe, 3 Hag. Ecc. 128, 130; 2 Greenl. Ev., § 51; Hodge v. Windham, Peake (N. P.), 38; Schorn v. Berry, 63 Hun, 110, 17 N. Y. S. 572.

be shown in mitigation of damages.¹ So, too, the fact that the husband and wife are living apart by agreement under articles of separation is no defense to such an action by the husband, where the injury complained of took place before the separation, and the fact of the injury was not known to the husband until afterwards.² But ordinarily the action will not lie where the injury takes place after the husband has, by articles of agreement, permanently separated from, and renounced the society and fellowship of, his wife.³

§ 242. **Liability of husband for torts of wife.**—The husband at common law was liable for the debts of the wife. Being unable to make a contract herself, and the husband succeeding to all her personal property which he might reduce to possession during the coverture, creditors having a right of action of any kind against the wife were deprived of the power to proceed against her because no judgment was permitted, and none could have been realized, perhaps, had it been permitted, against her during coverture. For these and other reasons it was necessary to make the husband liable for the torts of his wife, as otherwise the injured person might be practically or completely without a remedy.⁴ And the fact that the tort may have been committed by the wife in the absence of the husband, and even without his knowledge or consent, does not in the least alter the rule of his liability.⁵ In actions at common law to enforce a cause of action for a tort committed by the wife during coverture, it was necessary to join the husband as a defendant in the suit against the wife.⁶

¹ *Duberly v. Gunning*, 4 T. R. 651, 657; *Rogers v. Rogers*, 3 Hag. Ecc. 58; 2 Greenl. Ev., § 51; *Bromley v. Wallace*, 4 Esp. 237; *Foley v. Peterborough*, 4 Doug. (K. B.) 294; *Sanborn v. Neilson*, 4 N. H. 501; *Schorn v. Berry*, 63 Hun, 110, 17 N. Y. S. 572.

² *Chambers v. Caulfield*, 6 East, 245.

³ *Harvey v. Watson*, 7 M. & G. (E. C. L.) 644; *Winter v. Henn*, 4 C. & P. 494; *Bartelot v. Hawker*, Peake (N. P.), 7.

⁴ 2 Kent, Comm. 149; *Wheeler & Wilson Mfg. Co. v. Heil*, 115 Pa. St. 487, 8 Atl. Rep. 616; *Ferguson v. Col-*

lins, 8 Ark. 241, 252; *Carleton v. Haywood*, 40 N. H. 314; *Head v. Briscoe*, 5 Car. & P. (E. C. L.) 484; *Ball v. Bennett*, 21 Ind. 427; *Brazil v. Moran*, 8 Minn. 236; *Hinds v. Jones*, 48 Me. 348; *Rowe v. Smith*, 45 N. Y. 230; *Whitmore v. Delano*, 6 N. H. 543; *Keyworth v. Hill*, 3 Barn. & Ald. (E. C. L.) 685; *Morgan v. Kennedy*, 62 Minn. 348, 64 N. W. Rep. 912; *Lombard v. Batchelder*, 58 Vt. 558, 5 Atl. Rep. 511.

⁵ *Presnell v. Moore*, 120 N. C. 390, 27 S. E. Rep. 27.

⁶ *Whitmore v. Delano*, 6 N. H. 543;

And a failure to do this would be ground for reversal for this cause.¹ And when the parties are properly joined as defendants, all must unite in proceedings on error or appeal to reverse a judgment for the tort.² This liability of the husband is held to exist, though the parties be living apart, if they have not been regularly divorced.³ If the fraud or tort is committed in the presence of the husband without any objection on his part, he alone is liable, and it is not necessary to sue them jointly.⁴ This being true, the husband is liable alone for torts committed by himself and wife jointly,⁵ or by his wife when he is present, for the law presumes that she is acting under his influence when she commits a tort or fraud in his presence.⁶ This is true, also, even though the husband be not in the immediate presence of the wife when the act is committed. If he be near enough to exert an influence over her, this will be sufficient for all legal purposes.⁷ This presumption of influence on the part of the husband, when present, however, is not conclusive, but may be rebutted by any legitimate evidence showing the contrary.⁸

§ 243. Torts of wife — Liability of wife — Modern statutes.— At common law the husband was liable for the torts of his wife committed during coverture, but under modern statutes the rule is different. One of the reasons of the old rule was the strict unity in law of the relation of married persons, so that, whatever the wife might do, she being a part of this union, was chargeable to the husband, for he was also a part of it and the dominating part. The wife, during coverture, had no property rights, and this was another potent reason

Carleton v. Haywood, 49 N. H. 314;
Berry v. Nevys, 3 Cro. 661; Ball v.
Bennett, 21 Ind. 427; Fitzgerald v.
Quann, 109 N. Y. 441, 17 N. E. Rep.
354; Ferguson v. Neilson, 17 R. L. 81,
20 Atl. Rep. 229.

¹ Whitmore v. Delano, 6 N. H. 543.

² Whitmore v. Delano, 6 N. H. 543.

³ Head v. Briscoe, 5 Car. & P. 484.

⁴ Ball v. Bennett, 21 Ind. 427; Col-
lier v. Struby (Tenn.), 47 S. W. Rep.
90; Flesh v. Lindsay, 115 Mo. 1, 21 S.
W. Rep. 907; 2 Kent, Comm. 149;
Kosminsky v. Goldberg, 44 Ark. 401.

⁵ Brazil v. Moran, 8 Minn. 236.

⁶ 2 Kent, Comm. 149; Flesh v. Lind-
say, 115 Mo. 1, 21 S. W. Rep. 907; Col-
lier v. Struby (Tenn.), 47 S. W. Rep.
90; Kosminsky v. Goldberg, 44 Ark.
401; Appeal of Franklin, 115 Pa. St.
534, 6 Atl. Rep. 70.

⁷ Commonwealth v. Flaherty, 140
Mass. 450, 5 N. E. Rep. 258.

⁸ Smith v. Schoene, 67 Mo. App. 604;
Bethel v. Otis, 92 Iowa, 502, 61 N. W.
Rep. 200.

why the husband should answer for her shortcomings, because he took her property, and she thereafter, during coverture, had no dominion over it, nor even over her own lands, these being held by the husband in her right to his use during the marriage. But the situation is radically different with respect to the property of the wife under modern statutes in most of the American states. Now she does not give up any property upon her marriage, the husband having barely the contingent right of curtesy, which may be generally defeated by a sale of her land by the wife. He takes by the marriage none of her personalty, and she may contract and sue with reference thereto, and may alien and dispose of it at pleasure without the concurrence or sanction of her husband. She may usually transact or carry on any lawful business with her separate estate, and enjoy and control free from her husband this separate estate and all profits and increase thereof. The husband and wife are thus by the law itself materially divided to a sensible extent; her property interests are separated from him in both ownership and control. It will thus be clearly seen that the reason of the law fastening a liability upon the husband for the torts of the wife has been taken away, and, upon every sound principle of right, it is held that the law, too, has been abrogated at the same time and in the same manner.¹ And sometimes the wife is expressly made liable for her torts by statute.² But a statute authorizing an action against the wife individually for a tort does not warrant her arrest therefor, though others generally might, under the same circumstances, be subject to arrest.³ This is true because she will be held liable in any case where there would be no liability at common law, unless the liability is warranted by a strict construction of the statute making her liable.

¹ *Martin v. Robson*, 65 Ill. 129; *Lane v. Gryant* (Ky.), 37 S. W. Rep. 584; *Norris v. Corkill*, 32 Kan. 409, 4 Pac. Rep. 862; *Britt v. Pitts*, 111 Ala. 401, 20 S. Rep. 484; *Burt v. McBain*, 29 Mich. 260; *Ricci v. Mueller*, 41 Mich. 214, 2 N. W. Rep. 23; *Enright v. Hartsig*, 46 Mich. 469, 9 N. W. Rep. 496; *Weber v. Weber*, 47 Mich. 569, 11 N. W. Rep. 389; *Berger v. Jacobs*, 21 Mich. 215. The contrary is held in New York, where the statute eman-
cipates the wife only in reference to her separate property. *Mangam v. Peck*, 111 N. Y. 401, 18 N. E. Rep. 617.

² *Whalen v. Gabell*, 120 Pa. St. 284, 13 Atl. Rep. 940; *Blakeslee v. Tyler*, 55 Conn. 397, 11 Atl. Rep. 855.

³ *Whalen v. Gabell*, 120 Pa. St. 284, 13 Atl. Rep. 941; *Vocht v. Kuklence*, 119 Pa. St. 365, 13 Atl. Rep. 199.

§ 244. **Judgment against wife — Validity.**— As the wife, at common law, is incapable of making a contract by virtue of the disability of coverture, and as her existence is blended so intimately with that of her husband as to make it practically inseparable from his, no valid judgment can be had or rendered against her alone as long as the coverture existed.¹ And a judgment obtained against a married woman after coverture upon a contract while she was under this disability is also void.² Such judgments are not only voidable, but absolutely void and of no force whatever. Being so void, they may be assailed in a collateral attack.³ And a married woman cannot in any way bind herself, either at law or in equity, so as to authorize a personal judgment against her.⁴ When a judgment can be rendered against her at all under the old law, it could be only against her property. No judgment could be had against her personally in any court.

§ 245. **Judgment against wife — Modern statutes.**— The fact that, by statute, the wife is authorized to transact business generally with reference to her separate estate will not authorize or warrant a personal judgment against her. All the disabilities of coverture are not removed by empowering her to own property in her separate right and to contract and deal with reference thereto. And, as a rule, a judgment against her, to be valid, must first be upon a cause of action clearly within the law fixing her liability, and second, be against her separate property and not against her personally.⁵ So, in the case of a joint and several obligation by husband and wife secured by a mortgage on specified property, the remedy of the creditor is to have a personal judgment against the husband for the debt, but, as to the wife, the right to a decree is only *in rem*, enforceable against the property bound, and, as to the

¹ Tavenner v. Barrett, 21 W. Va. 658; Stockton v. Farley, 10 W. Va. 171; Carey v. Burruss, 20 W. Va. 571; White v. Foote Lumber & Mfg. Co., 29 W. Va. 385, 1 S. E. Rep. 572.

² White v. Foote Lumber & Mfg. Co., 29 W. Va. 385, 1 S. E. Rep. 572.

³ White v. Foote Lumber & Mfg. Co., 29 W. Va. 385, 1 S. E. Rep. 572.

⁴ Dollner v. Snow, 16 Fla. 86; Randall v. Bourquardez, 23 Fla. 264, 2 S. Rep. 310.

⁵ Johnson v. Ward, 82 Ala. 486, 2 S. Rep. 524; Crockett v. Doroit, 85 Va. 240, 3 S. E. Rep. 128; Steed v. Knowles, 84 Ala. 205, 3 S. Rep. 897. See, too, Turner v. Gill (Ky.), 49 S. W. Rep. 311.

wife, enforceable no further.¹ It is reversible error to render such personal judgment against a married woman.² And though a married woman may be vested with a limited power to contract, a judgment against her is void unless upon a cause of action for which she is expressly made liable by statute.³ And this fact must affirmatively appear from the proceedings. It cannot be shown collaterally in aid of the judgment.⁴

§ 246. Agency — Right of husband to act as agent of wife. Where the law permits a married woman to own and control property in her own right, there is an implication of law that she may employ some one to act in her stead with reference thereto, and she is not bound to intrust such business to a stranger, but may lawfully employ and authorize her husband to act for her.⁵ And where by statute the wife may employ her husband to conduct business transactions for her as her agent, such agency will be implied when the wife, with knowledge that an act has been done by the husband claiming to act in such capacity, accepts the fruits of the transaction or in any way recognizes it.⁶ In fact, the husband being at the head of his family, and having an interest in the welfare of his wife as well as the success and welfare of her business matters and property interests, is usually looked upon in law as the natural and presumptive agent of his wife.⁷ But the marriage relation

¹ *Dzialynski v. Bank of Jacksonville*, 23 Fla. 346, 2 S. Rep. 696; *Johnson v. Ward*, 82 Ala. 486, 2 S. Rep. 524.

² *Randall v. Bourquardez*, 23 Fla. 264, 2 S. Rep. 310.

³ *Baker v. Singer Mfg. Co.*, 122 Pa. St. 363, 15 Atl. Rep. 458.

⁴ *Baker v. Singer Mfg. Co.*, 122 Pa. St. 363, 15 Atl. Rep. 458.

⁵ *Chew v. Henrietta M. & S. Co.*, 2 Fed. Rep. 5; *Owen v. Cawley*, 36 N. Y. 600; *Knapp v. Smith*, 27 N. Y. 277; *Smith v. Sweeney*, 35 N. Y. 291, 295; *Draper v. Stouvenal*, 35 N. Y. 507, 513; *Bucaly v. Wells*, 33 N. Y. 518; *Stanley v. National Union Bank*, 115 N. Y. 122, 138, 22 N. E. Rep. 29; *Abbey v. Deyo*, 44 N. Y. 844; *Long v. Martin*, 71 Mo. App. 569; *Taylor v. Minigus*,

66 Ill. App. 70; *Stanley v. Bank*, 115 N. Y. 122, 23 N. E. Rep. 29; *Third National Bank v. Guenther*, 123 N. Y. 568, 25 N. E. Rep. 986; *Foster v. Persch*, 68 N. Y. 400; *Miller v. Handy*, 33 La. Ann. 160; *Hood v. Rodgers*, 99 Ga. 271, 25 N. E. Rep. 628; *Taylor v. Wands* (N. J. Law), 37 Atl. Rep. 315; *In re Leeds & Co.*, 49 La. Ann. 501, 21 S. Rep. 617; *Harris v. Weir-Shugart Co.* (Neb.), 70 N. W. Rep. 1118; *Ladd v. Newell*, 34 Minn. 107, 24 N. W. Rep. 366; *American Express Co. v. Lankford* (Ind. Ter.), 46 S. W. Rep. 183; *First Commercial Bank v. Newton* (Mich.), 75 N. W. Rep. 934.

⁶ *American Express Co. v. Lankford*, 39 S. W. Rep. 817.

⁷ *Railroad Co. v. Brooks*, 81 Ill. 292; *Mobley v. Leopahrt*, 47 Ala. 257;

itself does not raise a conclusive presumption that the husband is the agent of his wife or that he has authority to bind her by his acts.¹ So where a husband brings an action for his wife, his authority to do so must be established by affirmative proof.² The same is true where it is sought to enforce an agreement of any kind made by the husband on behalf of the wife.³ But by reason of the intimate confidential relation between husband and wife, slighter proof is required to establish the agency of the husband than in the case of a stranger.⁴ In an action between the wife and a stranger, she may testify in her own behalf, the disability of interest being removed by statute, of the authority she has vested in her husband as her agent, and of his acts and doings in furtherance of such authority.⁵ If the husband, on the other hand, permits his wife to carry on his business and do all things in a general way pertaining thereto in his name, she will be his general agent and her acts in such capacity accordingly binding upon him.⁶

When the husband acts as the agent of his wife by her authority, she becomes liable to others for his acts and omissions with reference to such agency, the same as though the marital relation did not exist,⁷ but only to the extent, however, that he has authority from her to do an act of agency for her with reference to her separate property. She is not liable for the torts of an agent where he is not engaged about her individual business or property, though she may have employed him and authorized him to perform an act of agency of some kind.⁸ Neither is the wife liable for any unauthorized acts of her husband, any more than she would be for the unauthorized acts of

American Express Co. v. Lankford, 39 S. W. Rep. 817; Furman v. Chicago, R. I. & P. R. Co., 68 Iowa, 219, 26 N. W. Rep. 83.

¹ Hoffman v. McFadden, 56 Ark. 217, 19 S. W. Rep. 753; Furman v. Chicago, R. I. & P. R. Co., 62 Iowa, 395, 17 N. W. Rep. 598.

² Comfort v. Sprague, 31 Minn. 405, 18 N. W. Rep. 108.

³ Nelson v. Bevins, 14 Neb. 153, 15 N. W. Rep. 208.

⁴ Furman v. Chicago, R. I. & P. R. Co., 62 Iowa, 395, 17 N. W. Rep. 598.

⁵ McAdow v. Hassard (Kan.), 48 Pac. Rep. 846.

⁶ Holmes v. Grover, 31 N. J. Law, 182.

⁷ Leppel v. Englekamp (Colo. App.), 54 Pac. Rep. 403; Gross v. Pigg, 73 Miss. 286, 19 S. Rep. 235; Matney v. Ferrell (Ky.), 38 S. W. Rep. 494; Bouck v. Enos, 61 Wis. 660, 21 N. W. Rep. 825; Shane v. Lyons (Mass.), 51 N. E. Rep. 976.

⁸ Collier v. Struby (Tenn.), 47 S. W. Rep. 90; Flesh v. Lindsay, 115 Mo. 1, 21 S. W. Rep. 907; Ferguson v. Neilson, 17 R. I. 81, 20 Atl. Rep. 229.

a stranger representing her.¹ But she is liable for the acts of her agent within the scope of his general authority, though the particular act of the husband as her agent or stranger then representing her was not expressly authorized;² though she may have an action against the agent for any breach of duty or culpable injury on his part, notwithstanding such agent be her husband;³ and of course the same rule would apply in case of a stranger. Where the husband, acting for his wife in placing her money at interest, without her knowledge or consent took a usurious bonus payable to himself, it was properly held that the wife was not chargeable with the consequences of usury.⁴ Nor is she liable for improvements placed on her land under a contract with her husband alone and on his own responsibility.⁵ Nor, again, is the wife liable in any case for the acts of the husband merely because he may transact business in her name, or claims to be the agent of his wife. He cannot constitute himself her agent; his authority must come from her, not from himself.⁶ But the power of a married woman to appoint an agent who may bind her by his acts with reference to her property rights and contractual liability must rest upon some statute, and when given by statute the law will not be construed so as to extend the power any further than necessary to give effect to the plain requirement of the act.⁷ And though the statutory right to appoint her husband as her agent exists, he nevertheless has no authority to bind or represent her in such capacity unless he has been actually appointed agent, or unless the wife, with full knowledge of the facts, ratifies the act of agency.⁸ And of course the fact that the wife employs her husband to manage her separate business or property will not make such separate estate liable for his debts.⁹

¹ *Newcomb v. Andrews*, 41 Mich. 518, 2 N. W. Rep. 672; *Morrison v. Berry*, 42 Mich. 389, 4 N. W. Rep. 731; *Sanford v. Pollock*, 105 N. Y. 450, 11 N. E. Rep. 838.

² *Maxcey Mfg. Co. v. Burnham*, 89 Me. 538, 36 Atl. Rep. 1003; *Elliott v. Bodoine*, 59 N. J. Law, 567, 36 Atl. Rep. 1038.

³ *Walker v. Beal*, 9 Wall. 743.

⁴ *Brigham v. Myers*, 51 Iowa, 397, 1 N. W. Rep. 613.

⁵ *Holmes v. Bronson*, 43 Mich. 562, 6 N. W. Rep. 89.

⁶ *Jarvis v. Scafer*, 105 N. Y. 289, 11 N. E. Rep. 634.

⁷ *Troy Fertilizer Co. v. Zachry* (Ala.), 21 S. Rep. 471; *Bank of America v. Banks*, 101 U. S. 240.

⁸ *Norfolk Nat. Bank v. Nenow*, 50 Neb. 429, 69 N. W. Rep. 936. And see *Hoene v. Pollak* (Ala.), 24 S. Rep. 349.

⁹ *Hyde v. Frey*, 28 Fed. Rep. 819.

§ 247. Agency of wife — Extent of authority — Presumptions.— There is no general presumption of law that the wife is the agent of the husband, or that any acts she may do for him are by him duly authorized. Her authority to act for him must be derived from him. She must be appointed or authorized to act as his agent, just as any other person must. She has no general authority of this kind by virtue of the marital relation.¹ Evidence to establish an agency in the husband so as to bind the wife must be stronger and clearer than that necessary to establish such a relation between ordinary strangers, or to establish the agency of the husband for the wife.² Where a stranger, therefore, borrowed property belonging to the husband from the wife without his consent, and without her being authorized by him to let it, he was held liable for a conversion.³ Of course the wife cannot sell any property belonging to the husband and thereby convey a good title thereto unless authorized so to do by him.⁴

§ 248. Agency — Possession in husband of wife's property — Notice.— Where it is permitted by law for the husband and wife to act in the capacity of agent for each other, the possession of property, real or personal, by one in such capacity is the possession, in law, of the other. Of this, third parties must take notice at their peril.⁵ This theory is also sustained upon the principle that, "when two persons have a common or joint possession of personal property, the law refers the possession to the title."⁶ So, where the husband and wife both occupy the realty of the wife, the fact that the husband is in possession with the wife will in no way detract from or affect the binding force or legality of the wife's possession; and this is true though the husband keeps the land in repair and pays the taxes thereon.⁷ But in such cases, as the possession of the

¹ *Green v. Sperry*, 16 Vt. 390; *Planing Mill Co. v. Brundage*, 25 Mo. App. 268; *Garnett v. Berry*, 3 Mo. App. 197.

² *Planing Mill Co. v. Brundage*, 25 Mo. App. 268.

³ *Green v. Sperry*, 16 Vt. 390.

⁴ *Schmoltz v. Schmoltz* (Mich.), 75 N. W. Rep. 185; *Dunnahoe v. Williams*, 24 Ark. 264.

⁵ *Michan v. Wyatt*, 21 Ala. 813; *Robinson v. Robinson*, 44 Ala. 227, 237; *Allen v. Hamilton*, 109 Ala. 634, 19 S. Rep. 903.

⁶ *Allen v. Hamilton*, 109 Ala. 634; 19 S. Rep. 903.

⁷ *Mygatt v. Coe*, 152 N. Y. 457, 46 N. E. Rep. 949.

husband would usually indicate that he was managing his own property instead of that of his wife, it is often the case that slight evidence will serve to convince the jury that the property thus managed by the husband is his own, and not that of his wife.¹

§ 249. General contracts between, before marriage — Effect of subsequent marriage.— Where a woman makes a contract with one who afterwards becomes her husband before the performance thereof, the contract, at common law, upon the consummation of the marriage, becomes void and of no force. By the marriage the parties become one in law, and, being thus one, cannot contract with each other, nor enforce any rights against each other by virtue of ordinary contracts. To permit this would be practically permitting a person to contract with himself. So, if a woman should execute a note to a man who, before the payment thereof, should become her husband, it cannot then be enforced, even though transferred to a third person by the husband after the marriage.²

§ 250. Conveyances to each other — Common-law rule.— It is the well-settled rule of the common law that a husband cannot convey property to his wife, nor she to him. This is true because of the legal unity of the two, which prevents them from making contracts with each other as to personal property or conveyances of real estate.³ To this general rule, however, there is at least an apparent exception. This is found in the case of conveyances by will. A will cannot become operative until the marriage has been terminated by the death of the

¹ *Brownelle v. Dixon*, 37 Ill. 197.

² *Long v. Kinney*, 49 Ind. 234; *Burleigh v. Coffin*, 22 N. H. 118.

³ *Co. Litt.*, § 168; 1 *Bl. Comm.* 442; *White v. Wager*, 25 N. Y. 328; *Coke, Litt.* 3a; *Shepard v. Shepard*, 7 Johns. Ch. 57; *Beard v. Beard*, 3 Atk. 72; *Voorhees v. Presbyterian Church*, 17 Barb. 103; *Martin v. Martin*, 1 Greenl. (Me.) 394, 398; *Rowe v. Hamilton*, 3 Greenl. (Me.) 63; *Johnson v. Stillings*, 35 Me. 427, 428; *Allen v. Hooper*, 50 Me. 371, 372; *Webster v. Webster*, 58 Me. 139, 142; *Savage v. Savage*, 80 Me.

472, 478, 15 Atl. Rep. 43; *Stickney v. Borman*, 2 Pa. St. 67; *Simmons v. McElwain*, 26 Barb. 419; *Aultman, Taylor & Co. v. Obermeyer*, 6 Neb. 260; *Fowler v. Triebein*, 16 Ohio St. 493; *Lavender v. Blackstone*, 2 Lev. 146; *Winans v. Peebles*, 32 N. Y. 423; *Long v. Kinney*, 49 Ind. 235, 238; *Winebrinner v. Weisiger*, 3 B. Mon. (Ky.) 32; *Waterman v. Higgins*, 28 Fla. 660, 10 S. Rep. 97; *Graham v. Struwe*, 76 Tex. 533, 18 S. W. Rep. 381.

testator, and, as it is of no force until the marriage is thus dissolved, and takes effect by operation of law when the relation does not exist, a conveyance from a husband to his wife by this mode will be good even at common law.¹ But a conveyance to a married woman by a stranger is valid so far as the grantor is concerned; it may be repudiated by the wife because of her disability of coverture. But, on the other hand, she is not required to renounce it, but may, likewise, ratify and confirm it as soon as she emerges from the disability of coverture, or within a reasonable time thereafter, when the transaction will become effective.²

§ 251. Voluntary conveyances between — Effect of at common law.— While equity would in many instances uphold a conveyance between husband and wife where good faith is shown, the rule at law with reference to voluntary conveyances is that they are usually held void as to creditors.³ These conveyances, however, are not necessarily fraudulent in all cases, as good faith may exist. Indeed, it is incumbent on the party complaining to show that the conveyance is not in good faith.⁴ These transactions will be good whenever it is necessary to so hold them in order to prevent an injustice. Thus, where the wife out of her own estate, in good faith and for a valuable consideration, purchases land from her husband, which he conveys to her by virtue of such purchase, she thereby acquires rights

¹ *Beard v. Beard*, 3 Atk. 72; Co. Litt., § 168; 1 Bl. Comm. 442.

² *Clewis v. Malone* (Ala.), 24 S. Rep. 767.

³ *Fowler v. Triebein*, 16 Ohio St. 493; *Winans v. Peebles*, 32 N. Y. 423; *Hoker v. Boggs*, 63 Ill. 161; *Lipscomb v. Lyon*, 19 Neb. 511, 27 N. W. Rep. 731; *Milholland v. Tiffany*, 64 Md. 455, 2 Atl. Rep. 831; *Sweeney v. Damron*, 47 Ill. 450; *Jones v. Brandt*, 59 Iowa, 332, 10 N. W. Rep. 854; *Belford v. Crane*, 16 N. J. Eq. 265; *Wyman v. Fox*, 59 Me. 100; *Triplett v. Graham*, 58 Iowa, 155, 12 N. W. Rep. 143; *Moore v. Orman*, 56 Iowa, 39, 8 N. W. Rep. 689; *Hendershott v. Henry*, 63 Iowa,

744, 19 N. W. Rep. 665; *Walsh v. Rosso* (N. J. Eq.), 41 Atl. Rep. 669.

⁴ *Mittleburg v. Harrison*, 11 Mo. App. 136; *Driggs v. Norwood*, 50 Ark. 42, 46, 6 S. W. Rep. 323; *Sexton v. Wheaton*, 8 Wheat. 229; *Mittleburg v. Harrison*, 90 Mo. 444, 3 S. W. Rep. 203; *Barrow v. Barrow*, 108 Ind. 345, 9 N. E. Rep. 371; *Emery v. Yount*, 7 Colo. 107, 1 Pac. Rep. 686; *Mattingly v. Harkness*, 75 U. S. 370; *Hinde's Lessee v. Longworth*, 11 Wheat. 199; *Wallace v. Penfield*, 106 U. S. 260, 1 Sup. Ct. Rep. 216; *Reade v. Livingston*, 3 Johns. Ch. 481; *Payne v. Stanton*, 59 Mo. 159; *McGregor-Noe Hardware Co. v. Horn* (Mo.), 47 S. W. Rep. 957.

which equity will protect.¹ Conveyances of this kind are good in equity without the intervention of a trustee or third party.²

§ 252. Conveyances between — Trustee as a medium.— While at common law a conveyance from the husband to his wife could not, ordinarily, be sustained, yet he might, by his deed in due form executed and delivered, covenant with others to stand seised to the use of his wife, or convey in trust for her. It was necessary to resort to a fiction in order to avoid the rigid rule of the unity of the husband and wife, and the unyielding principle that husband and wife, being one flesh, could not convey or contract *inter sese*.³ So a wife, at common law, could convey her real estate to her husband where they both joined in a deed to a third person who thereafter conveyed to him. By this circuitous means the title passed from the wife, as well as any interest the husband might have, through the instrumentality of the third person, in whom the title thereby became perfect. Having now the full title, such third person might convey all the title he had, which was the whole, to the husband, and it thereby became vested in him. While this is, in a sense, doing that indirectly which cannot be done directly, a thing the law does not usually tolerate, still it is the only mode by which the wife may divest herself of title to her realty and establish it absolutely in her husband by a conveyance, and *vice versa*.⁴

§ 253. Conveyances to each other — Effect.— Under the old law a conveyance between husband and wife was void, as they were incapable of contracting with each other. And even the modern statutes, which remove so many of the disabilities of married women, are held, usually, not to authorize contracts of conveyance from husband to wife or from wife to husband. But where by law the wife is empowered to

¹ *Simmons v. McElwain*, 26 Barb. 419.

² *Sims v. Ricketts*, 35 Ind. 181.

³ *Arundel v. Phipps*, 10 Ves. Jr. 139; 2 Kent, Comm. 130; *Voorhees v. Presbyterian Church*, 17 Barb. 103; *Dempsey v. Tylee*, 3 Duer, 73; *Tourney v. Sinclair*, 4 Miss. (3 How.) 324; *Ratcliffe v. Dougherty*, 24 Miss. 181; *Atlantic*

Nat. Bank v. Tavener, 130 Mass. 407; *Vicroy v. Vicroy* (Ky.), 45 S. W. Rep. 75.

⁴ *Meriam v. Harsen*, 2 Barb. Ch. 232; *White v. Wagner*, 25 N. Y. 328, 330; *Wicks v. Dean* (Ky.), 44 S. W. Rep. 397; *Warden v. Lyons*, 118 Pa. St. 396, 12 Atl. Rep. 408.

own, acquire and control property on her separate account and in her individual right, a conveyance of realty from a husband directly to his wife will be upheld. But such a conveyance does not pass the legal title—only the equitable estate; the legal title remaining in the husband, which he thereafter, so long as he lives, holds in trust for his wife.¹ When the husband dies, the legal title descends to his heirs, but still in trust for the wife, nevertheless. Such a conveyance creates in the wife an estate or interest of which she may dispose, just as she might any other separate property.² And of course this includes the power to mortgage or incumber.³ And a conveyance thus made to the wife, if in good faith and free from fraud, will vest the estate in the wife to the exclusion of creditors of the husband.⁴ If the wife to whom land has thus been conveyed by her husband should subsequently obtain a divorce from him, she would then succeed to the legal, as well as equitable, title by operation of law.⁵

§ 254. Conveyances between—Exceptions—Provision for wife out of husband's estate.—There is another exception to the general rule that husband and wife cannot convey to each other. This is in cases where the effect of the grant by the husband to the wife is but to make a reasonable provision out of his estate for her according to, and in keeping with, his condition, station, ability, etc. And a grant of this nature, or the necessary effect of which is to make such a proper provision for the wife, will always be upheld in equity; and this is true, though it be made by the husband to the wife direct and without the intervention of a trustee.⁶ But of course such a conveyance will not be sanctioned where it is thereby attempted to make an undue provision for the wife to the prejudice of an heir of the husband or of his creditors.⁷ And dealings of this

¹ *Powe v. McLeod*, 76 Ala. 418; *Conner v. Williams*, 57 Ala. 131; *Hill v. Meinhard (Fla.)*, 21 S. Rep. 805; *Pitts v. Sheriff*, 108 Mo. 116, 18 S. W. Rep. 1071.

² *Conner v. Williams*, 57 Ala. 131.

³ *Conner v. Williams*, 57 Ala. 131.

⁴ *Hill v. Meinhard (Fla.)*, 21 S. Rep. 805.

⁵ *Pitts v. Sheriff*, 108 Mo. 116, 18 S. W. Rep. 1071.

⁶ *Shepard v. Shepard*, 7 Johns. Ch. 57; *Stickney v. Borman*, 2 Pa. St. 67; *Aultman, Taylor & Co. v. Obermeyer*, 6 Neb. 260; *Barrow v. Barrow*, 24 Vt. 375; *Jones v. Clifton*, 101 U. S. 225; *Lloyd v. Fulton*, 91 U. S. 479; *Wells v. Treadwell*, 28 Miss. 717.

⁷ *Stickney v. Borman*, 2 Pa. St. 67.

kind between husband and wife, owing to the peculiarly confidential nature of the relation of the parties, will always be carefully scrutinized to the end that no fraud be perpetrated.¹ Whether or not transactions of this nature are to be deemed fraudulent or otherwise will usually be a question of fact. They are not necessarily either fraudulent or in good faith, but may be either, and this must be determined from the legitimate evidence going to support the one theory or the other.²

§ 255. Fraudulent conveyance — Bona fide consideration. As a conveyance of property by the husband to the wife is not *per se* invalid, and as the husband may as well convey property to his wife in good faith as to others for a valuable consideration, it is generally held at this day that a conveyance from husband to wife, supported by an adequate consideration, is good even as to strangers and third parties who might be affected thereby. Of course, such a conveyance can only be valid where the statutes have so far removed the disabilities of married women that they may contract with their husbands.³ Nor is a

¹ *Hoxie v. Price*, 31 Wis. 82; *Ambles, Adm'r, v. Mason*, 35 Pa. St. 261; *Bradford's Appeal*, 29 Pa. St. 513; *Keeney v. Good*, 21 Pa. St. 349; *Hoar v. Axe*, 22 Pa. St. 281; *Bresslauer v. Meissner*, 65 Wis. 377, 27 N. W. Rep. 47.

² *Leonard v. Green*, 34 Minn. 137, 24 N. W. Rep. 915.

³ *Lyon v. Zimmer*, 30 Fed. Rep. 401; *Darkin v. Darkin*, 17 Beav. 578; *Syracuse Plow Co. v. Wing*, 84 N. Y. 424; *Gibson v. Bennett*, 79 Me. 302, 9 Atl. Rep. 727; *Goff v. Rogers*, 71 Ind. 459; *Hill v. Bowman*, 35 Mich. 191; *Brookville Nat. Bank v. Kimble*, 76 Ind. 195; *Sedgwick v. Tucker*, 90 Ind. 271; *Jordan v. White*, 38 Mich. 253; *Kyger v. F. Hull Skirt Co.*, 34 Ind. 249; *Heath v. Slocum*, 115 Pa. St. 549, 9 Atl. Rep. 259; *Proctor v. Cole*, 104 Ind. 378, 4 N. E. Rep. 303; *City Bank v. Wright*, 68 Iowa, 132, 26 N. W. Rep. 35; *Hoxie v. Price*, 31 Wis. 82; *Hedge v. Glenny*, 75 Iowa, 513, 39 N. W. Rep. 818; *Lang v. Rickmers*, 70 Tex. 108, 7 S. W. Rep. 527; *Poppendick v. Fro-*

benius, 66 Mich. 317, 33 N. W. Rep. 887; *Cornell v. Gibson*, 114 Ind. 144, 16 N. E. Rep. 130; *Bailey v. Kansas Mfg. Co.*, 32 Kan. 73, 3 Pac. Rep. 756; *Rixey's Adm'r v. Detrick*, 85 Va. 42, 6 S. E. Rep. 615; *Blackmore v. Crutcher* (Tenn. Ch. App.), 46 S. W. Rep. 310; *Fenelon v. Hogaboom*, 31 Wis. 172; *Carpenter v. Tatro*, 36 Wis. 297; *Atlantic Nat. Bank v. Tavener*, 130 Mass. 407; *Steadman v. Wilbur*, 7 R. I. 481; *Babcock v. Eckler*, 24 N. Y. 623; *Hill v. Fouse*, 32 Neb. 637, 40 N. W. Rep. 760; *Metsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. Rep. 351; *Ward v. Parlin*, 30 Neb. 376, 46 N. W. Rep. 529; *Magniac v. Thompson*, 7 Pet. 348; *Davis v. Fredericks*, 104 U. S. 618; *Feder v. Ervin* (Tenn. Ch. App.), 38 S. W. Rep. 446; *Beard v. Randolph*, 29 Wis. 136; *Jones v. Brandt*, 59 Iowa, 332, 13 N. W. Rep. 310; *Kalamazoo Bank v. McAllister*, 46 Mich. 397, 9 N. W. Rep. 446; *Dull v. Merrill*, 69 Mich. 49, 36 N. W. Rep. 677; *Meigs v. Dibble*, 73 Mich. 101, 40 N. W. Rep.

man compelled, in law, to pay all his creditors before he does his wife, or prefer their claims to hers. Her demand, being *bona fide* and just, stands upon the same footing as any other demand, and, when the law tolerates preferences, the husband may pay his wife's debt before other claims, though the paying of her may deprive him of property sufficient to pay others.¹ So, where the husband borrows money from the wife upon an agreement to pay back to her property of the value of the money, he may thus pay his wife, and the transaction will be valid as against any creditors or others not having a fixed or vested interest in the property conveyed.² And the fact that the husband may be insolvent at the time of making the conveyance to his wife, the effect of which is to prefer her claim to that of other creditors, does not change the rule in the least. He has as much right to pay her when he is insolvent as when solvent, the debt, of course, being *bona fide*.³

Where property is conveyed to the husband in trust for the wife and her children, and the consideration is furnished with the separate property of the wife, and the transaction is thus made by her direction, it is not fraudulent as to the creditors of the husband.⁴ When the wife furnishes the money with which to buy real or other property, and the husband, instead of taking the title in his wife's name, has same made to himself, he may convey to his wife the title thus acquired with her funds, and his creditors will not be heard to complain.⁵ In fact, any valuable and sufficient consideration will suffice to sustain a con-

935; Hackworth v. Johns (Ky.), 9 S. W. Rep. 656; Jaquith v. Massachusetts Baptist Conv. (Mass.), 52 N. E. Rep. 544. And see Wall v. Stapleton (Ill.), 52 N. E. Rep. 477.

¹ Hoes v. Boyer, 108 Ind. 494, 9 N. E. Rep. 427; Dice v. Irvin, 110 Ind. 561, 11 N. E. Rep. 488; Lyon v. Zimmer, 30 Fed. Rep. 401; Iowa City Bank v. Weber, 72 Iowa, 137, 33 N. W. Rep. 606; Brigham v. Hubbard, 115 Ind. 474, 17 N. E. Rep. 920; Cooper v. First Nat. Bank, 40 Kan. 5, 18 Pac. Rep. 937; Service v. Watson, 37 Kan. 750, 16 Pac. Rep. 55.

² Barrows v. Keene, 15 R. L. 484, 8 Atl. Rep. 713.

³ Brickley v. Walker, 68 Wis. 563, 32 N. W. Rep. 773; Whaun v. Atkinson, 84 Ala. 592, 4 S. Rep. 681; Rockford Boot & Shoe Mfg. Co. v. Mastin, 75 Iowa, 112, 39 N. W. Rep. 219; Chapman v. Summerfield, 36 Kan. 610, 14 Pac. Rep. 235; Monroe v. May, 9 Kan. 473; Kennedy v. Powell, 34 Kan. 22, 7 Pac. Rep. 606.

⁴ Cook v. Jones (Tenn. Ch. App.), 47 S. W. Rep. 14.

⁵ Bell v. Stewart, 98 Ga. 669, 27 S. E. Rep. 153; Taylor v. Duesterberg, 109 Ind. 165, 9 N. E. Rep. 107; Beard v. Puett, 105 Ind. 68, 4 N. E. Rep. 671; Heberd v. Wines, 105 Ind. 237, 4 N. E. Rep. 457.

veyance from husband to wife and *vice versa*, except that of love and affection merely, even as to strangers.¹ And it has been held that this is true, though by the conveyance it was the purpose of the grantor to get the property conveyed beyond the reach of creditors or to defraud them, for the conveyance itself is lawful, and the law will not ground a fraud upon a lawful act.² A conveyance by a husband to his wife in consideration of her releasing or renouncing her estate by dower, or any other interest in his land given her by law, the values being properly proportionate, will be upheld as to the parties as well as strangers and creditors.³ A husband may convey his property to his wife upon the consideration that she will care for his mother in her old age, if the amount conveyed be not unreasonable for the purpose.⁴ And where the husband or wife takes a deed from the other in payment of a *bona fide* indebtedness, the fact that the deed is not placed on record by the grantee will not make it either void or fraudulent as to creditors or strangers.⁵ This is true because the law does not, as a rule, require that a deed be recorded in order that the grantee therein may have title. The possession of the vendee is notice of the character of this possession, and when held under a deed, whether registered or not, it is notice to the world of the claim of the occupant. Marriage is a sufficient consideration to sustain a conveyance from the husband to the wife, even as to creditors who would be prejudiced thereby; for this is the highest consideration known to the law. So, where a man agrees with a woman that he will convey to her certain property if she will marry him, and this agreement is carried out by the wife, a conveyance of the property to the wife in pursuance of such agreement, though not made until after the marriage takes place, will be good as against creditors and others.⁶

¹ Hyde v. Powell, 47 Mich. 156, 10 N. W. Rep. 181; Loomis v. Smith, 37 Mich. 595; Allen v. Antisdale, 38 Mich. 228; First Nat. Bank v. McAlister, 46 Mich. 397, 9 N. W. Rep. 446.

² Pollock v. Meyer, 96 Ala. 172, 11 S. Rep. 385; Dawson v. Flash, 97 Ala. 539, 12 S. Rep. 67; Beddow v. Shepard (Ala.), 23 S. Rep. 662.

³ Patrick v. Patrick, 77 Ill. 555; German-American Seminary v. Saenger,

66 Mich. 249, 33 N. W. Rep. 301; Keagy v. Trout, 85 Va. 390, 7 S. E. Rep. 329.

⁴ Hyde v. Powell, 47 Mich. 156, 10 N. W. Rep. 181.

⁵ Otis v. Sprague (Mich.), 76 N. W. Rep. 154; Bankworth v. Palmer (Mich.), 76 N. W. Rep. 151; Michigan Trust Co. v. Adams (Mich.), 66 N. W. Rep. 1094.

⁶ Marmon v. White (Ind.), 51 N. E. Rep. 930.

§ 256. **Conveyance from wife to husband.**—The statutes now in force very generally authorize a conveyance from the husband direct to the wife. And while such a conveyance does not operate to pass to the wife the legal title directly from the husband, yet the courts generally agree that it will pass to her the equitable estate, the husband holding the legal title in trust for the wife. And where the wife is emancipated to the extent that she may alone dispose of her separate property regardless of her husband, there seems no good reason why she may not be permitted to convey to her husband where he would be permitted to convey to her. He is under no disability, and has never been at common law, the disability to contract by reason of coverture being visited upon the wife, not the husband. It seems, therefore, upon principle as well as authority, that the wife may convey her separate property to her husband, and that her conveyance thus made will at least vest in him an equitable title.¹ And it would seem, further, that where a married woman is empowered by statute to convey her property as if unmarried and without her husband joining in the deed, she could convey to her husband with like effect as to a stranger. And this is the doctrine in Maine under a statute very similar to those in force in many of the states authorizing a wife to deal with her separate property as a *feme sole*.² This ruling seems to be based upon common sense and sound reason, and will doubtless commend itself whenever the same question presents itself elsewhere.

§ 257. **Fraudulent conveyances — Rule as to present and future creditors.**—A voluntary or other conveyance between husband and wife may be valid as to future creditors and void as to existing ones. In order that it be void, so far as subsequent creditors are concerned, it is necessary that the fraudulent intent exist at the time of the conveyance, and that it be made in contemplation of the future transaction, or that the effect of it will necessarily prejudice the interests of subsequent creditors, the grantor, at the time of effecting the conveyance, having an intention to make future dealings on a credit.³ But

¹Turner v. Shaw, 96 Mo. 28, 8 S. W. Rep. 897. And see Wilson v. Holt, 83 Ala. 528, 3 S. Rep. 321.

²Savage v. Savage, 80 Me. 472, 15 Atl. Rep. 43.

³Page v. Kendrick, 10 Mich. 300;

a voluntary conveyance between husband and wife is, generally speaking, void only as to existing creditors, unless there be a specific intent at the time of making same to defraud future creditors.¹ And a conveyance by the husband to a stranger in fraud of his wife who holds *bona fide* and valid claims against him is just as much a fraud as though the conveyance had been made to the wife to the injury of any other creditor of the husband, and the wife may avail herself of any rights because thereof, just as strangers and third persons might.² If the consideration for the conveyance is partly good, and void in part, as to creditors, the transferee will not be required to account to an injured creditor of the grantor, whether the creditor be the husband or wife or a stranger, for the full value of the property transferred, but only for that part of it which is in excess of the lawful consideration or its value.³ This is entirely reasonable, for it would be unjust to charge the grantee in favor of a creditor of the grantor to a greater amount than the creditor has been injured by the transaction.

§ 258. Fraudulent conveyances — Rule where wife allows husband to treat her property as his own and build up a credit upon the faith of it.— There is a salient rule governing conveyances of property between husband and wife when the rights of creditors are concerned. This rule is, where the wife lends the husband money, or furnishes him property of her own, and this is used by him as his, and is so represented by

Barkworth v. Palmer (Mich.), 76 N. W. Rep. 151; *Gale v. Gould*, 40 Mich. 515; *Mutual Trust Co. v. Adams*, 109 Mich. 181, 66 N. W. Rep. 1094; *Campbell v. Remlay* (Mich.), 70 N. W. Rep. 432; *Wooden v. Wcoden*, 72 Mich. 353, 40 N. W. Rep. 460; *Ware v. Purdy* (Iowa), 60 N. W. Rep. 526; *Knight v. Kidder* (Me.), 1 Atl. Rep. 142; *Payne v. Stanton*, 59 Mo. 159; *Mittelbury v. Harrison*, 11 Mo. App. 136; affirmed, 90 Mo. 444, 3 S. W. Rep. 203; *Reade v. Livingston*, 3 Johns. 481, 501; *Johnson v. Skaggs* (Ky.), 2 S. W. Rep. 493; *Wallace v. Penfield*, 106 U. S. 260, 1 Sup. Ct. Rep. 216; *Mattingley v. Nye*, 8 Wall. 370; *Driggs & Co. Bank v. Norwood*, 50 Ark. 42, 6 S. W. Rep. 323;

Crawford v. Beard, 12 Oreg. 447, 8 Pac. Rep. 537; *Smith v. Vodges*, 92 U. S. 183; *Everist v. Pierce* (Iowa), 77 N. W. Rep. 508; *King v. Wells* (Iowa), 77 N. W. Rep. 338.

¹*Hinde's Lessee v. Longworth*, 11 Wheat. 199; *Roper v. Getman* (Iowa), 75 N. W. Rep. 177; *Belford v. Crane*, 16 N. J. Eq. 265; *Otis v. Sprague* (Mich.), 76 N. W. Rep. 154; *Reade v. Livingston*, 3 Johns. Ch. 481; *Payne v. Stanton*, 59 Mo. 158.

²*Chase v. Chase*, 105 Mass. 385; *Houseman v. Grossman*, 177 Pa. St. 453, 35 Atl. Rep. 736.

³*Patrick v. Patrick*, 77 Ill. 555; *Columbia Savings Bank v. Winn*, 132 Mo. 80, 33 S. W. Rep. 457.

him to creditors, with the consent and without the objection of the wife, and creditors are thereby induced to lend credit to the husband upon the belief and faith that the property is his, not hers, she will not afterwards, as to creditors thus misled, be permitted to assert any claim to such money or property.¹ Especially is this true in equity, where such a transaction would be regarded as a gift from the wife to the husband, which the wife could not defeat as to creditors or even as to the husband himself.² Of course, however, there could be no gift, relinquishment of title or repudiation of ownership, or right to compensation therefor, unless the husband and wife actually so intended, or the circumstances are such as to necessarily imply such intent. And whether this is true or not will usually be a question of fact.³ The burden of showing that the transaction was not intended by the wife as a relinquishment of her property rights, or that she was not to receive pay therefor at the hands of her husband, is on the party alleging these facts. For, unless she renounces her rights or permits her husband to use her property to the prejudice of his creditors, whereby they are injured, there is nothing of which they can complain.⁴ It has been held that a wife does not assent to the use of her funds by her husband as his own, in directing him to make purchases of property for her, the title to which he takes in his own name, and she permits it to so remain in

¹ *Humes v. Scruggs*, 94 U. S. 22; *Carpenter v. Roe*, 10 N. Y. 227; *Wake v. Griffin*, 9 Neb. 47, 2 N. W. Rep. 461; *Lipscomb v. Lyon*, 19 Neb. 511, 27 N. W. Rep. 731; *Driggs & Co. Bank v. Norwood*, 50 Ark. 42, 6 S. W. Rep. 323; *Savage v. Murphy*, 34 N. Y. 508; *Glover v. Alcott*, 11 Mich. 470; *Gardner v. Gardner*, 1 Giff. (Eng. V.-C.) 126; *Hanson v. Manley*, 72 Iowa, 48, 33 N. W. Rep. 357; *Gross v. Redding*, 45 Pa. St. 406; *Slaughter v. First Nat. Bank (Ky.)*, 40 S. W. Rep. 674; *Hoagland v. Wilson*, 15 Neb. 320, 18 N. W. Rep. 78; *Knowlton v. Mish*, 17 Fed. Rep. 198; *Jenkins v. Middleton*, 68 Md. 540, 13 Atl. Rep. 155; *Geo. Taylor Com. Co. v. Bell*, 62 Ark. 26, 34 S. W. Rep. 80. See also *Jones v. Brandt*, 59

Iowa, 332, 10 N. W. Rep. 854; *Rosenbaum v. Davis* (Tenn. Ch. App.), 48 S. W. Rep. 706. And see *Thompson v. Stringfellow (Ala.)*, 24 S. Rep. 849.

² *Reeder v. Flinn*, 6 S. C. 216, 220; *McLure v. Lancaster*, 24 S. C. 273; *Martin v. Jennings (S. C.)*, 29 S. E. Rep. 807; *Charles v. Coker*, 2 S. C. 136.

³ *McLure v. Lancaster*, 24 S. C. 273, 281; *Martin v. Jennings (S. C.)*, 29 S. E. Rep. 807.

⁴ *Stockslager v. Mechanics' L. & S. Inst. (Md.)*, 39 Atl. Rep. 742; *Levi v. Rothschild*, 69 Md. 348, 14 Atl. Rep. 535; *Keeny v. Good*, 21 Pa. St. 349; *Gamber v. Gamber*, 18 Pa. St. 363; *Nicholson v. Condon*, 71 Md. 620, 18 Atl. Rep. 812.

ignorance of the legal effect thereof.¹ But of course it is otherwise if the wife renounces the property to her husband without taking any obligation of payment, verbal or otherwise, from him.²

§ 259. Voluntary conveyance — Validity as between the parties.— While creditors may assail a conveyance from husband to wife as being without consideration and as in fraud of their rights, yet, as between the immediate parties to the transaction, the conveyance will be good. The grantor will not be heard to say that he has perpetuated a fraud in making the conveyance, and that therefore no title has passed, for the law will not permit him to perpetrate a fraud and afterwards claim any benefit by reason thereof; nor will the grantee be permitted to complain that he or she, as the case may be, has been a party to a fraudulent transaction, and therefore it ought not to stand.³ If there are no creditors to complain, a conveyance of property from a husband to his wife is good against the world.⁴ The love and affection of the husband for the wife in such cases is an adequate and sufficient consideration to support the transfer, though a consideration is not really necessary. The law simply leaves the parties where it finds them, unless strangers are injured. And a voluntary conveyance between husband and wife is good, even as to creditors, where the grantor reserves enough property to pay all his debts.⁵

§ 260. Conveyances between will be scrutinized — Onus probandi.— As the husband is supposed in law, as well as equity, to exercise a very potent influence over his wife, courts always scrutinize conveyances and transfers from the wife to the husband. His relation of confidence and love afford him a powerful advantage over others, and when the rights of others with reference to the property of a married woman come in conflict with those of the husband, and he seeks to assert his claim by

¹ *Alkire Gro. Co. v. Ballenger*, 137 Mo. 369, 38 S. W. Rep. 911.

² *Roane v. Hamilton*, 101 Iowa, 250, 70 N. W. Rep. 181.

³ *Atwater v. Seely*, 2 Fed. Rep. 133; *Elwell v. Walker*, 52 Iowa, 256, 3 N. W. Rep. 64.

⁴ *Pawley v. Vogel*, 42 Mo. 301; *Terry v. Wilson*, 63 Mo. 493; *Fitzgerald v. Fitzgerald*, 168 Mass. 488, 47 N. E. Rep. 431.

⁵ *Patrick v. Patrick*, 77 Ill. 555; *Gridley v. Watson*, 53 Ill. 186. And see *Gardiner v. Booth*, 31 Ala. 186.

virtue of a conveyance from his wife, or where the wife attempts to assert a claim to property by reason of a sale from him, as against his creditors, the *onus* is on the party thus claiming, to show clearly that the transaction was *bona fide* and legitimate.¹ And in all such cases, courts of equity, being vigilant for earmarks of fraud, will often set aside conveyances of this kind upon slight evidence of bad faith or undue influence on the part of the husband.² And in order to entitle one in interest to a decree setting aside such a transfer, it is not necessary to show a fraudulent intent on the part of the husband in making the representations which superinduced the conveyance or transfer, but it is sufficient if it was made under a mutual mistake or misapprehension of fact.³ The fraud or undue influence may be inferred from the nature of the transaction and the surrounding circumstances, or it may be shown by the occasional or habitual exercise of such influence.⁴ And generally to establish good faith in a transfer of property from a husband to his wife in payment of an obligation, it must be shown affirmatively that the money received by the husband was furnished him with the mutual understanding that it be paid back, or, if it is property, that it be paid for by the husband.⁵ And further, the proof necessary to sustain good faith in transactions between husband and wife and those occupying a confidential relation to each other must be that which sustains the good faith stronger than is necessary in the case of dealings between strangers.⁶ The

¹ *Sears v. Shafer*, 6 N. Y. 268; *Rose v. Brown*, 11 W. Va. 132; *Herzog v. Weiler*, 24 W. Va. 199; *Hooser v. Hunt*, 65 Wis. 71, 10 N. W. Rep. 442; *Kaiser v. Waggoner*, 59 Iowa, 40, 12 N. W. Rep. 754; *Ford v. Harrington*, 16 N. Y. 285, 288; *Coutts v. Acworth*, L. R. 8 Eq. 558, 567; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. Rep. 780; *Keagy v. Trout*, 85 Va. 390, 7 S. E. Rep. 329; *First Nat. Bank v. Bartlett*, 8 Neb. 819, 1 N. W. Rep. 27; *Boyd v. De La Montagnie*, 73 N. Y. 498; *Elyton Co. v. Vance (Ala.)*, 24 S. Rep. 719; *Thompson v. Loenig*, 13 Neb. 386, 14 N. W. Rep. 168; *Gramling v. Dickey*, 118 N. C. 986, 24 S. E. Rep. 671; *Fisher v. Shelver*, 53 Wis. 498, 10 N. W. Rep.

681; *Kingsbury v. Davidson*, 112 Pa. St. 380, 4 Atl. Rep. 33.

² *Boyd v. De La Montagnie*, 73 N. Y. 498.

³ *Boyd v. De La Montagnie*, 73 N. Y. 498, 503.

⁴ *Sears v. Shafer*, 6 N. Y. 268, 272.

⁵ *Wake v. Griffin*, 9 Neb. 47, 2 N. W. Rep. 461; *Eggleston v. Slusher*, 50 Neb. 83, 69 N. W. Rep. 310; *Coburn v. Storer (N. H.)*, 36 Atl. Rep. 607; *Brownell v. Stoddard*, 42 Neb. 177, 60 N. W. Rep. 380.

⁶ *Wedgworth v. Wedgworth*, 84 Ala. 274, 4 S. Rep. 149; *Knight v. Capito*, 23 W. Va. 639, 644; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. Rep. 780; *Hill v. Fouse*, 32 Neb. 637, 49 N.

fact that the property sought to be reached is in the possession of the wife and under her control when the creditor seeks to realize from it will not excuse the wife from the burden of showing that she paid a fair consideration in good faith therefor.¹ But while the presumption of fact which the law indulges brands transactions as between husband and wife as fraudulent and void as to creditors of the husband when no consideration is shown to have passed between the husband and wife, and while stronger proof is required of the husband or wife thus claiming property by virtue of a sale or transfer from the other than in cases of an ordinary civil nature, yet the wife or husband, as the case may be, is not required to sustain his or her claim by proof of the necessary facts beyond a reasonable doubt; for this would be to require the standard of proof necessary to convict in criminal cases.² The law never presumes fraud, and it "will not be inferred from an act which does not necessarily import it; and circumstances of mere suspicion leading to no certain results are not sufficient to prove it."³

§ 261. Conveyance of realty — Necessity for acknowledgment.— It is often required by statute that a conveyance of a *feme covert*, in order to be effective as to her interest in the land conveyed, must be executed in a certain way and in accordance with prescribed formalities. They are also frequently required to be acknowledged by the wife apart from her husband. The fact that the wife is usually supposed to be under the sway of her husband has prompted the legislatures to be more guarded in laying down the requirements of conveyances by married women than by married men. And it is frequently required that there be a privy and separate examination of the wife by some officer authorized to take acknowledgments, to the end that it may be ascertained by such officer whether the wife has been unduly persuaded or urged by her husband. The legisla-

W. Rep. 760; Horton v. Dewey, 53 Wis. 410, 10 N. W. Rep. 599.

¹ Stephens v. Carson, 30 Neb. 544, 46 N. W. Rep. 655.

² Stephens v. Carson, 30 Neb. 544, 46 N. W. Rep. 655. And see Patrick v. Leach, 8 Neb. 530, 1 N. W. Rep. 853.

³ Toney v. McGhee, 38 Ark. 419, 427; Connolly v. Rogers, 51 Iowa, 704, 1 N. W. Rep. 214; Hedge v. Glenny, 75 Iowa, 513, 39 N. W. Rep. 818; Roberts v. Washington Nat. Bank, 11 Wash. 550, 40 Pac. Rep. 225.

tures have the constitutional authority to prescribe these requirements for conveyances by married women.¹ And it is usually held that a conveyance by a married woman which does not comply with these various and more or less similar statutory requirements is void.² These statutes must at least be substantially complied with, and this fact must affirmatively appear from the certificate of the officer certifying the acknowledgment.³ And it is generally held that a literal compliance with the statute is not required, but that a substantial conformity will suffice.⁴

§ 262. Conveyance to wife free from control of husband — Effect of.—It is often the case under late statutes that property is conveyed to a married woman free from the debts, liabilities, control or management of her husband. Such a conveyance vests the property in the wife with the unhampered right of disposal, except that she may not incumber or dispose of it to pay his debts, or otherwise in his interest or behalf, or for his benefit.⁵ Of course it is not necessary that the conveyance be made direct to the wife. It may as well be made to a trustee with the same restrictions, and when so done the trust thus effected will be upheld according to the purposes and terms of the conveyance.⁶ No set form of words is nec-

¹ *Elliott v. Lessee of Piersol*, 1 Pet. 328.

² *Hepburn v. Dubois*, 12 Pet. 845; *Chaffe v. Oliver*, 39 Ark. 581; *Beavers v. Baucum*, 33 Ark. 722; *Conner v. Abbott*, 35 Ark. 365; *Worsham v. Freeman*, 34 Ark. 55; *Rhea v. Renner*, 1 Pet. 105; *Lloyd v. Taylor*, 1 Dall. 17; *Wilson v. Simpson*, 68 Tex. 306, 4 S. W. Rep. 839; *Elliott v. Pearce*, 20 Ark. 508; *Bank of Louisville v. Gray*, 84 Ky. 565, 2 S. W. Rep. 168; *McKesson v. Stanton*, 50 Wis. 297, 6 N. W. Rep. 881; *Caldwell's Appeal* (Pa.), 7 Atl. Rep. 211; *Bank v. Bailhace*, 65 Cal. 327, 4 Pac. Rep. 106; *Williams v. Cudd*, 26 S. C. 213, 2 S. E. Rep. 14; *Sims v. Ray*, 96 N. C. 87, 2 S. E. Rep. 443; *Groesbeck v. Bodman*, 73 Tex. 287, 11 S. W. Rep. 322.

³ *Little v. Dodge*, 32 Ark. 453. And

see *Dundas v. Hitchcock*, 12 How. (U. S.) 256; *Deery v. Cray*, 5 Wall. 795; *Wambole v. Foot*, 2 Dak. 1, 2 N. W. Rep. 239; *Blair v. Sayre*, 29 W. Va. 604, 2 S. W. Rep. 97; *Laidley v. Central Land Co.*, 30 W. Va. 305, 4 S. E. Rep. 705.

⁴ *Appeal of Gable* (Pa.), 7 Atl. Rep. 52; *Schley v. Pullman's Palace Car Co.*, 120 U. S. 575, 7 Sup. Ct. Rep. 730; *Homer v. Sconfield*, 84 Ala. 313, 4 S. Rep. 105.

⁵ *Jones v. Clifton*, 101 U. S. 225; *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. Rep. 280; *Sidway v. Nichol*, 62 Ark. 146, 34 S. E. Rep. 529; *Small v. Field*, 102 Mo. 120, 14 S. W. Rep. 815; *Bowen v. Chase*, 94 U. S. 812. And see *Green v. Green*, 23 Wall. 486.

⁶ *Bowen v. Chase*, 94 U. S. 812.

essary to convey the separate estate. If it appear from the whole transaction that the wife is to take the property free from her husband's control, this will be sufficient.¹ But any attempt she may make to use the property thus received for her husband or his benefit, whether by grant, incumbrance, pledge or otherwise, to secure his debts or assure a benefit to him in any form, will be entirely without legal force or effect.² The husband has no interest whatever in such separate estate thus vested in the wife, and cannot bequeath or otherwise dispose of it in whole or in part.³ But in order that an estate be thus created in the wife free from any rights of the husband, the language of the conveyance must make it clear that it was so intended. So, a transfer of personalty to a wife and her children, without any limitation or restriction, will not vest title in the wife free from the marital rights of the husband.⁴

§ 263. Agreement of separation — Conveyance of property in pursuance thereof.—The rule at common law is, deeds or articles of separation are not favored because they tend to militate against the stability of the marriage relation and encourage a kind of dissolution thereof by the will of the parties. Deeds for future separation are always held to be void as against public policy. But articles of separation are sometimes upheld. Where the parties have actually separated, or where an immediate separation is in view, and by which the husband conveys to the wife an equitable part of the estate, or by which the property rights of either or both parties in the estate of the other, such as community rights, curtesy, dower, etc., are agreed upon and divided, no fraud or undue influence being practiced, they are usually held valid.⁵

¹ Prout v. Roby, 15 Wall. 472; Phillips v. Grayson, 23 Ark. 769; Gainus v. Cannon, 42 Ark. 503.

² Sidway v. Nichol, 62 Ark. 164, 34 S. W. Rep. 529.

³ Prout v. Roby, 82 U. S. 472. And see Marshall v. Beall, 6 How. (U. S.) 70.

⁴ Rixey's Adm'r v. Detrick, 85 Va. 42, 6 S. E. Rep. 615; Buckner v. Davis, 29 Ark. 444; Gainus v. Cannon, 42 Ark. 503.

⁵ Rains v. Wheeler, 76 Tex. 394, 13 S. W. Rep. 324; Hitner's Appeal, 54 Pa. St. 110; McCubbin v. Patterson, 16 Md. 179; Stebbins v. Morris, 18 Mont. 32, 47 Pac. Rep. 642; Walker v. Beal, 9 Wall. 743; Commonwealth v. Richards, 131 Pa. St. 209, 18 Atl. Rep. 1007; Dillinger's Appeal, 35 Pa. St. 357; Loud v. Loud, 4 Bush (Ky.), 453; Randall v. Randall, 37 Mich. 563; Robertson v. Robertson, 25 Iowa, 350; Carson v. Murray, 3 Paige, 483; Mc-

A deed of separation, by the terms of which the wife may control and dispose of her separate estate as she wishes during her life, is valid and binding, although she afterwards becomes reconciled to her husband and cohabits with him again.¹ And where the husband by such deed secures a certain income to the wife, she will be entitled to it absolutely, and he cannot set off the expenses of living furnished her by him against her right thereto.² But equity will never lend its aid to enforce an agreement of separation between husband and wife, for this would be to deprive each of marital rights and privileges, and besides would be contrary to public policy. It would be to enforce a contract in the nature of an agreement for a divorce, and the effect would be at least a limited divorce between the parties brought about by their mutual act.³ These agreements of separation are never upheld, either at law or in equity, when they are grounded upon a future instead of a present separation of the parties.⁴ The agreement to live apart simply, considered apart from any consideration whereby the one would convey property to the other, the transfer of which is required by law to be in writing, may be by parol.⁵ A valid agreement of separation between the husband and wife will deprive the widow of any statutory allowance as such upon the death of the husband.⁶ But, though the wife be living separate and apart from her husband in pursuance of articles of separation entered into between them, she cannot be sued alone under the common-law rule.⁷ And if the wife, after executing articles of separation from her husband, whereby he binds himself to pay her a stipulated sum for support, subsequently sues for and obtains a divorce, this will not affect the liability of the husband under the articles where no provision for the support of the wife is made in the decree.⁸ Nor will the fact that she may become

Kee v. Reynolds, 26 Iowa, 578; Fox v. Davis, 113 Mass. 255. And see Switzer v. Switzer, 26 Gratt. (Va.) 574. ter's Appeal, 54 Pa. St. 110; Randall v. Randall, 37 Mich. 563; Walker v. Beal, 9 Wall. 743.

¹ Walker v. Beal, 9 Wall. 743.

² Walker v. Beal, 9 Wall. 743.

³ McKennan v. Phillips, 6 Whart. (Pa.) 571, 575.

⁴ McKee v. Reynolds, 26 Iowa, 578; Carson v. Murray, 8 Paige, 483; Hin-

⁵ Emery v. Neighbor, 7 N. J. Law, 142.

⁶ Dillinger's Appeal, 35 Pa. St. 357.

⁷ McDermott v. French, 15 N. J. Eq. 78.

⁸ Carpenter v. Osborne, 102 N. Y. 552, 7 N. E. Rep. 823.

reconciled and return to live with him as his wife affect it, on the other hand.¹ An agreement of separation releasing the parties "from all obligations and liability for the future acts and debts of each other" does not bar either from succeeding to the estate of the other under the law governing community property rights.²

§ 264. Authority of each over property of the other.— Where the husband and wife are permitted by law to own and control their respective property they may act for each other in the management thereof, though of course this fact will not entitle the one thus representing the other to any part of the property thus managed, or the proceeds, if sold. And if either thus acting for the other receive any property or proceeds belonging to the other, he or she, as the case may be, will become accountable to the other therefor.³ If either thus come to the property of the other, and thereupon set up a claim to it, the *onus* is on him or her to show title other than the mere fact of possession or control by virtue of an agency or consent of the other.⁴ And neither the husband nor the wife can sell, incumber or dispose of the property of the other unless authorized so to do by the owner.⁵ This being true, neither can be affected or in any way bound as to their respective property rights by any acts, declarations or admissions of the other made or done in the absence, and without the authority, knowledge or sanction of the owner.⁶

§ 265. Abandonment of wife by husband — Effect on property rights of wife.— As to the property rights which the wife takes in the estate of her husband by virtue of the marriage, these remain in tact, so far as the husband is concerned, so long as she is not at fault as a wife. No misconduct on his part can be invoked in his behalf to prejudice her in the enjoyment of such right in the least. So, if the husband should abandon his

¹ Walker v. Beal, 7 Wall. 743.

² Jones v. Lamont, 118 Cal. 499, 50 Pac. Rep. 766.

³ Yocum v. Allen, 58 Ohio St. 280, 50 N. E. Rep. 909.

⁴ Yocum v. Allen, 58 Ohio St. 280, 50 N. E. Rep. 909.

⁵ Harvey v. Galloway, 48 Mich. 531, 12 N. W. Rep. 689; Caffé v. Oliver, 3 Fed. Rep. 609.

⁶ Benedict v. Pearce, 58 Conn. 496, 5 Atl. Rep. 375.

wife without fault on her part justifying it, and marry another, the second marriage would be void and the second wife would take no property rights on account of such marriage. But the dower and any other property rights of the first wife which she may have taken by reason of the first marriage will remain the same as though there had been no desertion or second marriage.¹

§ 266. Void marriage—Status of wife's property.—In order that the relation of husband and wife may change the property rights of either party, the marriage must be valid—at least voidable only. No rights accrue by virtue of a marriage which is of no force. And in a proceeding to declare such a marriage void, the court dissolving the same may order the restoration to the wife of all the property which she had at the time of the marriage, or which may have come to her since.² Doubtless, however, the wife, in such cases, would not be forced to appeal to the court for the restoration of her property in a suit for divorce, but might sue any person in the possession thereof to regain it or recover its value for conversion. The marriage being void could be thus attacked in a collateral proceeding.

§ 267. Right of husband to recover for injury to wife.—At common law there is a well-recognized right of action enforceable by the husband for an injury to his wife. No one has any legal right to deprive the husband of the enjoyment of his wife's society, her services, and the pleasures she affords him as a marital companion, without incurring a legal liability to respond to the injured party in proper damages.³

¹ In *re Grieve's Estate*, 165 Pa. St. 126, 30 Atl. Rep. 727.

² *Wheeler v. Wheeler*, 76 Wis. 631, 45 N. W. Rep. 531; *Wheeler v. Wheeler*, 79 Wis. 303, 48 N. W. Rep. 260.

³ *Russell v. Corne*, 2 Ld. Raym. 1031; 3 Bl. Comm. 140; *McWhirter v. Hatten*, 42 Iowa. 288; *Gulf, C. & S. F. Ry. Co. v. Glenk*, 9 Tex. Civ. App. 599, 30 S. W. Rep. 278; *Union Pac. Ry. Co. v. Jones*, 21 Colo. 54, 40 Pac. Rep. 891; *Dix v. Brooks*, 1 Str. 151; *Smith v. Hixon*, 2 Str. 977; *Baker v.*

Bolton, 1 Camp. 493; *Smith v. St. Joseph*, 55 Mo. 456; *Nixon v. Jacobs*, 21 Mich. 215; *Southern Kansas Ry. Co. v. Pavey*, 57 Kan. 521, 46 Pac. Rep. 969; *Long v. Morrison*, 14 Ind. 595; *Barnes v. Hurd*, 11 Mass. 59; *Matterson v. Railway Co.*, 35 N. Y. 487; *Hopkins v. Railway Co.*, 36 N. H. 9; *Keller v. Gilman*, 93 Wis. 9, 66 N. W. Rep. 800; *Skoglund v. Minneapolis St. Ry. Co.*, 45 Minn. 330, 47 N. W. Rep. 1071. And see *Missouri, K. & T. Ry. Co. v. Vance* (Tex. Civ. App.), 41 S.

Nor is the right to recover limited to instances where the injury deprives the husband, to a greater or less extent, of the *consortium* or services of the wife. But the action will be maintainable whenever an injury of any kind has wrongfully been inflicted upon the wife by another.¹ Of course if the injury is to the wife alone, it is necessary, at common law, that both the husband and wife join in the action for the tort.² And the husband, under the old law, could release the right of action and thereby prevent any recovery, present or future, in either himself or his wife or both of them;³ though the husband cannot release a cause of action for an injury or other right of action in the wife where by statute she is authorized to sue alone therefor.⁴ But a wife is not entitled to recover from a wrong-doer for any damages accruing to her husband; as, for instance, medical treatment and like necessities required by reason of the injury. For these the husband himself is liable, and when he is tortiously subjected to this liability by another, he, and not the wife, has a right of action against the tort-feasor.⁵ Where a single act results in an injury to both husband and wife, the husband will not be precluded from suing for the loss of the services of his wife because he may have sued alone and recovered for the injury resulting to himself individually;⁶ though he could sue for both injuries in one action.⁷ Nor is a recovery by a wife for a personal injury incapacitating her to manage her separate business any bar to an action by the husband against the same wrong-doer for the loss of services of his wife, and similar damages where the same tort resulted in such loss to the husband as well as damage to the wife individually.⁸ But a husband cannot, re-

W. Rep. 167; *Garmany v. Gainesville* (Tex. Civ. App.), 41 S. W. Rep. 730; *Missouri, K. & T. Ry. Co. v. Holman* (Tex. Civ. App.), 39 S. W. Rep. 130.

¹ *Wolf v. Bauereis*, 74 Md. 481, 19 Atl. Rep. 1045.

² *Wolf v. Bauereis*, 74 Md. 481, 19 Atl. Rep. 1045; *Dashiell v. Griffith*, 84 Md. 363, 35 Atl. Rep. 1094; *Baltimore City Pass. Ry. Co. v. Kemp*, 61 Md. 74; *Nichols v. Dubuque & D. R. R. Co.*, 68 Iowa, 732, 28 N. W. Rep. 44; *Long v. Morrison*, 14 Ind. 595; *Laughlin v. Eaton*, 54 Me. 156.

³ *Long v. Morrison*, 14 Ind. 595.

⁴ *Martin v. Robson*, 65 Ill. 129.

⁵ *Belyea v. Minneapolis, St. P. & S. S. M. Ry.*, 61 Minn. 224, 63 N. W. Rep. 627; *State v. Detroit* (Mich.), 72 N. W. Rep. 8.

⁶ *Newbury v. Railroad Co.*, 25 Vt. 377; *Skoglund v. Minneapolis St. Ry. Co.*, 45 Minn. 330, 47 N. W. Rep. 1071.

⁷ *Cincinnati, H. & D. Ry. Co. v. Chester*, 57 Ind. 297.

⁸ *Southern Kansas Ry. Co. v. Pavey*, 57 Kan. 521, 46 Pac. Rep. 969; *Kelly v. New York, N. H. & H. R. R. Co.*,

cover at common law, suing in his own right, for any mental suffering of either himself or wife arising from an injury to her.¹ Where the ground of action is a breach of a contract made with the husband alone, the husband and wife cannot both recover therefor, although the injury was to the wife and would not have occurred but for a breach of a contract or guaranty of a third person with the husband. Thus, where one sells the husband dangerous machinery or appliances of any kind under a contract that it is safe, and the wife is injured because of a latent danger existing therein, the liability for the injury accrues to the husband, if sued for because of a breach of the contract, for there is no privity of contract between the wife and the seller.² A stranger is liable to the husband in proper damages where he furnishes his wife opium without his knowledge or consent, whereby she becomes so addicted to the habit as to be of less service and pleasure to him.³

§ 268. Crime by wife — Instigation by husband.— A married woman is much favored by the common law in respect to crimes committed by her in the presence or by the instigation or direction of her husband. She is supposed to be part and parcel of him, and peculiarly under his dominion and influence, and is not amenable to the criminal laws for offenses so committed by her, as a general rule.⁴ By the common law the wife was protected under this rule from criminal liability in all cases except murder, treason, and perhaps other grave and heinous offenses, and if the act was done in his presence, it was presumed that it was by the assent, advice or direction of the husband.⁵ In this country the leaning of the authorities seems to be that the coercion of the husband will absolve the wife from guilt in all criminal cases without exception.⁶ But even

168 Mass. 308, 46 N. E. Rep. 1063; Richmond Ry. & E. Co. v. Lowles, 92 Va. 738, 24 S. E. Rep. 388.

¹ Hyatt v. Adams, 10 Mich. 180; Nixon v. Ludlam, 50 Ill. App. 273.

² Longmeid v. Holliday, 6 Exch. 761; Dashiell v. Griffith, 84 Md. 363, 35 Atl. Rep. 1094.

³ Holleman v. Harvard, 119 N. C. 150, 25 S. E. Rep. 972.

⁴ Freel v. State, 21 Ark. 212; Davis v. State, 15 Ohio, 72; 4 Bl. Comm. 29; Edwards v. State, 27 Ark. 493; State v. Kelly, 74 Iowa, 589, 38 N. W. Rep. 503; State v. Houston, 29 S. C. 108, 6 S. E. Rep. 943.

⁵ Davis v. State, 15 Ohio, 72, 77; Hale, P. C. 44.

⁶ Freel v. State, 21 Ark. 212; Edwards v. State, 27 Ark. 493.

though the act be committed by the wife in the presence of her husband, the presumption that she acted under his coercion may be rebutted by any competent evidence tending to destroy such presumption, and when the same is overturned by sufficient evidence, the *feme covert* stands upon precisely the same footing as any other criminal.¹ And in order that the defense of coverture be available, it is incumbent on the wife to show by a preponderance of evidence that the coverture existed at the time of the commission of the crime.² But the husband is in no case liable criminally for any acts of his wife committed in his absence without his knowledge, instigation or sanction.³ In some of the states there are statutes excusing a crime in a wife when committed under the threats or coercion of her husband, making him alone liable. But even under these statutes there is no presumption that a crime committed by a married woman is done under such influence, but this question is one of fact and is to be controlled by the evidence.⁴

§ 269. Right of husband to recover for injury to wife — Elements of damages.— The husband is not entitled to recover anything for the pain or anguish which his wife may suffer by reason of a wrongful injury to her; neither can he, because of such act, recover for his own mental suffering and pain of mind. His right of recovery is limited to such damages only as will compensate for all the expenses which it may have been necessary for him to incur for medical treatment and attention in a proper effort to effect a cure or relieve the injury, in which is included such sums as have been necessary to procure proper nursing and attention during the illness or disability resulting from the injury, as well as for the loss of his own time necessarily or properly devoted to the personal care and attention of his wife. Expenses of this kind, too, may be recoverable to the extent that they will be reasonably necessary in the future, where they result necessarily from the injury, and the injured one has not fully recovered at the time of the action for the

¹ 1 Russell, Crimes (1896), 146; State v. Kelly, 74 Iowa, 589, 38 N. W. Rep. 503; State v. Houston, 29 S. C. 108, 6 S. E. Rep. 943.

² Davis v. State, 15 Ohio, 72.

³ 4 Bl. Comm. 29; Mills v. State, 18 Neb. 575, 26 N. W. Rep. 354.

⁴ State v. Hendricks, 32 Kan. 559, 4 Pac. Rep. 1050.

damages. Damages recoverable in such instances include also the loss by the husband of the society and comfort of his wife since the injury, present, and prospective as well. There is no rigid criterion by which all the damages may be arrived at, but this must be left to the intelligent and impartial deliberation of the jury.¹

§ 270. Husband and wife — Rights, duties and liabilities of the wife — Statutory changes in the common law — Rule of construction.—It is the generally recognized rule that all statutes which change the common-law status of husband and wife, and enlarge the rights, powers or abilities of the wife to contract or bind herself, or changing her duties to her husband or to the world at large, must receive a strict construction. They will not be extended by interpretation or otherwise beyond the strict terms of the law as it is written upon the statutes.² And where it is sought to fasten a liability upon a married woman, not recognized at common law, the burden of showing every fact necessary to support it is upon the party contending for the liability.³ This canon of construction in these cases is but an application of the familiar rule that statutes invading, changing, modifying or abrogating the common rule as to any principle of law will receive a strict construction and not be extended further than absolutely necessary to carry out their plain requirements.

§ 271. Wife's pin money.—The term "pin money" is applied to an allowance by the husband to the wife, whether in an annual or other periodical stipend or otherwise, for her own

¹ Union Pac. Ry. Co. v. Jones, 21 571, 8 Atl. Rep. 965; Lowekamp v. Colo. 54, 40 Pac. Rep. 891; Hall v. Roechling, 64 Md. 95, 3 Atl. Rep. 35; Hallander, 7 Dowl. & Ryl. (K. B.) 133. Mueller v. Wiese, 95 Wis. 381, 70 N.

² Davis v. First Nat. Bank, 5 Neb. W. Rep. 485; Edwards v. McEnhill, 242; Hale v. Christy, 8 Neb. 264; State 51 Mich. 160, 16 N. W. Rep. 322; Buhler v. Jennings, 49 Mich. 538, 14 N. W. Sav. Bank v. Scott, 10 Neb. 83, 4 N. W. Rep. 488; Maulsby v. Byers, 67 Md. Rep. 314; Barnum v. Young, 10 Neb. 440, 10 Atl. Rep. 235; Rood v. Willey, 309, 4 N. W. Rep. 1054; Kemp v. Kemp, 58 Vt. 474, 5 Atl. Rep. 409; Gwynn v. 85 N. C. 491; Gillespie v. Smith, 20 Gwynn, 27 S. C. 25, 4 S. E. Rep. 220; Neb. 455, 80 N. W. Rep. 526; Stiles v. Lord (Ariz.), 11 Pac. Rep. 314; Edison Shannon v. Canney, 44 N. H. 592.

v. Babka (Mich.), 69 N. W. Rep. 499; ³Reid v. Stevens, 88 S. C. 519, 17 Kirby v. Boyette, 118 N. C. 244, 24 S. E. Rep. 358. S. E. Rep. 18; Davis v. Carroll, 71 Md.

private use in supplying herself with the numerous little necessities incident to her domestic affairs.¹ And it is only payable during cohabitation.² But at common law the money thus agreed to be given the wife by the husband was personal to the use of the wife, and if she died, her executors had no cause of action against the husband to recover arrears.³ This being true, upon the death of the wife any pin money she may have on hand at such time goes to her husband.⁴ But there is a duty enjoined by law upon the wife to use the money for the legitimate purposes for which it is given. She has no right, because of the fact that it is pin money, to waste it in gambling, for instance, or in any other reckless and unnecessary way.⁵ And it seems that a wife has no right to recover pin money agreed to be paid to her by her husband for more than a year back.⁶ Pin money, of course, like any other property, is subject to taxation.⁷ It is property, though pin money. Being property, it would necessarily follow as a general rule that it is taxable.

§ 272. Authority of wife to make contracts concerning her domestic affairs.—In law, the husband is supposed to be busy looking after his duties in making a support for his family. For this reason, among others, his wife may make necessary contracts concerning her domestic affairs. For the law well supposes that he cannot attend to those devolving upon himself as well as those coming naturally within the scope and bounds of the affairs of the wife as a member of his household. It often devolves, therefore, upon the wife to superintend and manage all matters pertaining to her domestic duties, and to make all contracts necessary and proper which are incident thereto.⁸ Having the charge of her husband's domestic property in his absence, she may lawfully let

¹Bouvier's Law Dict., "Pin Money;" Black's Law Dict., "Pin Money;" Thomas v. Bennett, 2 P. Wms. 341; 2 Bright, Husband and Wife, 288; Helms v. Franciscus, 2 Bland (Md. Ch.), 544, 564.

²Helms v. Franciscus, 2 Bland (Md. Ch.), 544, 564.

³Thomas v. Bennett, 2 P. Wms. 341; Peacock v. Monk, 2 Ves. Sr. 189, 191.

⁴Howard v. Earl of Digby, 8 Bligh, N. R. 224.

⁵Jordell v. Jordell, 9 Beav. 45, 55.

⁶Townsend v. Windham, 2 Ves. Sr. 1, 7; Aston v. Aston, 1 Ves. Sr. 264, 267; 2 Bright, Husband and Wife, 289; Howard v. Earl of Digby, 8 Bligh, N. R. 224.

⁷Ball v. Coutts, 1 V. & B. 292.

⁸Church v. Landers, 10 Wend. 79.

it for hire if he has authorized no one else to do so.¹ If the husband abandons his wife, leaving infant children with her, she may hire them out in order that they may help towards earning a support for themselves and her.² And a wife who, with her husband, is carrying on a business of any kind may, upon desertion and abandonment by him, continue the business for the purpose of earning a support for herself and children, and may make any reasonable and proper contracts necessary to the successful management of the business, and the husband will be liable upon the same.³

§ 273. Authority of wife to act as trustee for stranger.— There seems no good reason for withholding from a married woman authority to execute a trust, or to forbid her to act in a trust capacity. Her disabilities, as a general rule, are no more effective than those of infancy; and an infant may, generally speaking, act as an agent or in other representative capacity, as trustee, etc. He does not take his authority to act from his legal status as an infant, but receives it from the power conferring the trust upon him and naming its conditions, stipulations and requirements. And, in performing the trust, the power to do so reaches back to the grantor and takes life from his power to make disposition. And it is even so with a married woman. She may act as trustee, and her conduct in this capacity will be upheld, though she could not do similar acts with reference to her own property.⁴ So, while a married woman could not, at law, make a valid conveyance of her property, yet she could convey it, though realty, in the capacity of trustee, when the power so to do is found in the instrument or transaction creating the trust and providing the manner in which the same may or shall be carried out.⁵

§ 274. Coverture — Disabilities — Limitations.— As a married woman, at common law, cannot sue alone, and as it is against the policy of the law, as a rule, to hold any one to the statute of limitations until such person could sue, it is generally

¹ Church v. Landers, 10 Wend. 79.

⁴ Gridley v. Wynant, 64 U. S. 500.

² Camerlin v. Company, 10 Allen (Mass.), 359; Wodell v. Coggshall, 2 Metc. (Mass.) 89.

And see Gridley v. Westbrook, 23 How. (U. S.) 503.

⁵ Gridley v. Wynant, 64 U. S. 500.

³ Rotch v. Mills, 2 Conn. 638.

held that the statute cannot be invoked to cut off any of the rights of a married woman during coverture, or until a reasonable time thereafter is allowed her within which to assert her rights.¹ Frequently, if not generally, for convenience and certainty, statutes provide the time within which, after the removal of the disability of coverture, a married woman may assert or defend any right. But where the law fixes the time within which an action must be brought, and in broad and general terms denies a right of action thereafter, without making any exceptions for infancy, coverture, and like disabilities, coverture cannot be interposed to defeat the operation of the statute. In other words, "the statute which creates the limitation must also create the exception;"² though it is customary in legislative enactments, limiting the time within which an action may be brought, to embody a saving clause in favor of those laboring under the disabilities of lunacy, infancy, coverture, etc. But when the wife is empowered and authorized by law to sue and enforce her rights as any one *sui juris* might do, the statute will then run against her, just as it will against any one else; for as to such cause of action she is then practically discovert.³

§ 275. Coverture as a defense — Who may plead.— The disabilities of coverture are for the protection of the wife. They were never intended for strangers or third persons. The law is well settled, therefore, that none but the wife herself, or her privies, can plead her disabilities.⁴ So if the wife, while covert, execute an obligation as principal, which, because of her coverture, is not binding upon her, it will nevertheless be effective as to her sureties, for they are not under any disability to bind themselves, and cannot plead, for their own bene-

¹ *Vance v. Vance*, 108 U. S. 514; *Wood, Lim.*, § 240.

² *State Bank v. Morris*, 13 Ark. 291; *Pryor v. Ryburn*, 16 Ark. 671; *Erwin v. Turner*, 6 Ark. 14; *Wright v. Kleyla*, 104 Ind. 223, 4 N. E. Rep. 16; *York v. Bright*, 4 Humph. (Tenn.) 312; *Thompson v. Sherrill*, 51 Ark. 453, 11 S. W. Rep. 689.

³ *Garland County v. Gaines*, 47 Ark. 558, 2 S. W. Rep. 460; *Percy v. Cock-*

rill, 10 U. S. App. 574, 4 C. C. A. 73, 53 Fed. Rep. 822.

⁴ *Shropshire v. Burns*, 46 Ala. 108; *Marion v. Regenstein*, 98 Ala. 475, 13 S. Rep. 384; *Scarborough v. Borders* (Ala.), 22 S. Rep. 180; *Robinson v. Thrailkill*, 110 Ind. 117, 10 N. E. Rep. 647; *Bennett v. Mattingly*, 110 Ind. 197, 11 N. E. Rep. 792; *Johnson v. Coldcleugh*, 34 Ark. 312.

fit, a disability personal to the wife, and which the law throws around her for her exclusive benefit and protection.¹ Moreover, in order to be successfully pleaded, this must be done before judgment.² This being true, a judgment against a married woman by default will be good if she has been regularly served with process;³ provided, of course, the wife be under no disability when the judgment is rendered.

§ 276. Coverture—Strangers must take notice of.—All persons must take notice of the legal disabilities of those with whom they make contracts or have dealings of any kind, including, of course, that of coverture. They may not enter into an agreement with a married woman, whether ignorant of her coverture or not, and then, when confronted with the law protecting those who labor under this disability, plead their ignorance of the fact that they are married and thereby defeat the provisions of the law. It is clear that if such were allowed, the protection of coverture would amount to little more than a myth and delusion.⁴ But while this is true the wife is not required to interpose the plea of coverture. She may waive it, and a judgment against her upon a cause of action accruing while she was under the disability is not absolutely void, but voidable only.⁵ Under such a judgment an execution may be levied upon the separate property of the wife.⁶ But a judgment rendered against a married woman who has aptly pleaded coverture cannot be enforced, as it is then shown, upon its face, that it is not authorized by law.⁷ And it may be pleaded by demurrer when the complaint shows that the defendant is married.⁸ But unless pleaded in some appropriate way the disability will be deemed waived.⁹ It must be understood, however, that this can be waived by the wife only while she is not under any disability. For instance, when sued after discoverture

¹ Gardner v. Barnett, 36 Ark. 365.

² Smith v. Hudson, 53 Ark. 178, 13 S. W. Rep. 597.

³ Chollar v. Temple, 39 Ark. 238.

⁴ Keller v. Orr, 106 Ind. 406, 7 N. E. Rep. 195.

⁵ Adcock v. Nann (Tenn. Ch. App.), 38 S. W. Rep. 99.

⁶ Woodfolk v. Lyon, 98 Tenn. 269, 39 S. W. Rep. 227.

⁷ Flannagan v. Oliver-Finnie Grocer Co., 98 Tenn. 599, 40 S. W. Rep. 1079.

⁸ Jordan v. Smith, 83 Ala. 299, 3 S. Rep. 703.

⁹ Marion v. Regenstein, 98 Ala. 475, 13 S. Rep. 384; Scarborough v. Borders (Ala.), 22 S. Rep. 180. And see, too, Reed Lumber Co. v. Lewis, 94 Ala. 626, 10 S. Rep. 332.

upon a cause of action which might be defeated by the plea of coverture because of this state existing when the right of action accrued, a failure to set up the coverture would be a waiver, for the defendant is then bound in law by her acts and omissions, though it is otherwise during the coverture.

§ 277. Incompetency to testify for or against each other — General rule of the common law.— It is the firmly fixed rule of the common law that husband and wife may not testify for or against each other. “This is a settled principle of law and equity,” says Chancellor Kent, “and is founded as well on the interest of the parties being the same, as on public policy.”¹ The reason of the rule is twofold: First, it is manifest that evidence by a husband or wife for or against the other, in either a civil or criminal case, will be more or less partial, though unconsciously so to the witness. Another very important reason is, any other rule would open to the world the breasts of the husband and wife, and lay bare matters confided to each other, because of the marital relation and the mutual love, confidence and respect entertained by the husband and wife for each other by reason of such relation. While it may be imperatively necessary, it might be said, that the evidence of the husband or wife for or against the other be permitted in some cases to avert a miscarriage of justice, yet the law in its unyielding exaction, as well as its solicitous regard for the absolute sanctity, sacredness and secrecy of all communications between husband and wife, as well as all information derived by the one or the other because of or through the marital relation in any way, sets its seal of denial upon such evidence, and thus insures all proper confidential communication and domestic secrecy between husband and wife, preferring that some occasional hardships may follow rather than a rule so wholesome, salient and protective should be violated. For, by the experience of the ages and from the logic of reason as well, the evils arising from an unbridled judicial investigation of the confidential affairs of the husband and wife, in connection with the fact that all evidence by either for or against the other must, in the nature of things, be much

¹ 2 Kent, Comm. 179; United States v. Jones, 32 Fed. Rep. 569; Stein v. Bowman, 13 Pet. 209; Storrs v. Storrs, 23 Fla. 274, 2 S. Rep. 368; Tiley v. Cowling, 1 Ld. Raym. 744; Crawford v. State (Wis.), 74 N. W. Rep. 537.

warped because of human frailty and infirmity, according to its probable effect, the law deems such evidence incompetent and contrary to public policy.¹ This being true, an indictment or information based on the evidence of the husband or wife alone against the other will be quashed on motion and a showing accordingly.² But the fact that the indictment was found upon the evidence of the husband will not suffice as ground of attack on the validity of the indictment where there was other evidence which was competent to support it.³ Nor is it necessary that the interest of the witness be direct. If one of the

¹ 2 Hawk. P. C. 600, 601; 2 Hale, P. C. 279; 1 Bl. Comm. 443; Lessee of Snyder v. Snyder, 6 Bin. (Pa.) 483; Rex v. Cliviger, 2 T. R. 263; Davis v. Dinwoody, 4 T. R. 678; Hall v. Hill, 2 Str. 1094; Rex v. Locker, 5 Esp. 107; City Bank v. Bangs, 3 Paige Ch. 36; Barrow v. Grillard, 3 Ves. & Bea. 165; Alban v. Pritchett, 6 T. R. 680; Copous v. Kauffman, 8 Paige, 583; Bentley v. Cooke, 8 Doug. 422; McGuire v. Maloney, 1 B. Mon. (Ky.) 244; Ratcliff v. Wallis, 1 Hill (N. Y.) 63; Schultz v. State, 32 Ohio St. 276; Steen v. State, 20 Ohio St. 333; Gibson v. Commonwealth, 87 Pa. St. 253; Kelly v. Drew, 12 Allen (Mass.), 107; Commonwealth v. Sparks, 7 Allen (Mass.), 534; State v. Welch, 28 Me. 30; Ex parte James, 1 P. Wms. 610; Fitch v. Hill, 11 Mass. 285; State v. Bridgman, 49 Vt. 202; State v. Neill, 6 Ala. 685, 686; L. A. & N. C. Gravel Road Co. v. Madans, 102 Ill. 417, 419; Yowles v. Young, 13 Ves. Jr. 140; Magness v. Walker, 26 Ark. 470; Stein v. Bowman, 13 Pet. 209; Collins v. Mack, 31 Ark. 634; Phipps v. Martin, 33 Ark. 207; Beecher v. Brookfield, 33 Ark. 239; Little Rock & Ft. S. R. R. Co. v. Payne, 33 Ark. 816; Pleasanton v. Nutt, 115 Pa. St. 266, 8 Atl. Rep. 63; Brock v. Brock, 116 Pa. St. 109; Bradford v. Vinton (Mich.), 26 N. W. Rep. 401; Bietman v. Hopkins, 109 Ind. 177, 9 N. E. Rep. 720; Casey v. State, 37 Ark. 67; Watkins v. Turner, 34 Ark. 663; Jones v.

Degge, 84 Va. 685, 5 S. E. Rep. 799; Warwick v. Warwick, 31 Gratt. (Va.) 70; Frank v. Lilienfield, 33 Gratt. (Va.) 377, 388; Radford v. Fowlkes, 85 Va. 820, 8 S. E. Rep. 817; Sedgwick v. Watkins, 1 Ves. Jr. 49; Griggs' Case, T. Raym. 1; 1 Greenl. Ev., § 340; Treleaven v. Dixon, 119 Ill. 548, 9 N. E. Rep. 189; United States v. Kan-Gi-Shun-Ca (Crow Dog), 8 Dak. 106, 14 N. W. Rep. 437; Carney v. Gleissner, 58 Wis. 674, 17 N. W. Rep. 398; United States v. Jones, 32 Fed. Rep. 569; Schnabel v. Betts, 23 Fla. 178, 1 S. Rep. 692; Lingreen v. Ill. Cent. R. R. Co., 61 Ill. App. 174; Leggett v. Boyd, 8 Wend. 376; Hasbrouck v. Clough (Wis.), 68 N. W. Rep. 875; Owen v. State, 78 Ala. 425; McGrath v. Miller, 61 Ill. App. 497; Mills v. United States, 1 Pin. (Wis.) 73; Bird v. Hulston, 10 Ohio St. 418; Watson v. Riskamire, 45 Iowa, 231; Ayers v. Protection Ass'n, 76 Va. 225; Dwelly v. Dwelly, 46 Me. 377; McKeen v. Frost, 46 Me. 239; Dexter v. Booth, 2 Allen (Mass.), 559; Wilkie v. People, 53 N. Y. 525; People v. Reagle, 60 Barb. 527; Thomas v. State, 14 Tex. App. 70.

² Commonwealth v. Woodcroft, 17 Pa. Co. Ct. Rep. 554; Taulman v. State, 37 Ind. 353; Thomas v. State, 14 Tex. App. 70.

³ State v. Shreve (Mo.), 38 S. W. Rep. 548, 549.

parties is indirectly interested in the result in any way the rule is the same. So, where the judgment might be used for or against the husband or wife in an action to which one of them is a party, the evidence is incompetent.¹ And the rule, resting on public policy, as it does, cannot be dispensed with by the consent of the parties.² Where neither the husband nor wife is a party to the action, either may ask the other, as a witness, questions, the answers to which would not impute a criminal act, for the purpose of impeaching or weakening the testimony of the other.³

§ 278. Competency to testify — Rule where party directly interested cannot testify.— Where, by reason of any statutory or common-law disqualification, the party in interest is not permitted to testify, the husband or wife of such party will not be permitted to do so, even though the disqualification of interest is removed. Instances of this kind are of occasional occurrence where the question of the admissibility of evidence against administrators or executors of a deceased person arises under statutory or constitutional provisions forbidding a party in interest to testify in an action by an executor or administrator as to declarations, acts or transactions with the deceased party. In such and all like cases where the wife could not testify, the husband cannot.⁴ On the other hand, where by statute or judicial construction a wife is made competent to testify against her husband, she may also testify for him, and he, likewise, for her.⁵ And under a statute which permits either the wife or husband to testify in an action to which the other is a party or in which he or she is interested, either may elect to testify or introduce the other. But such election will be binding only on the one making it.⁶

¹ Labarree v. Wood, 54 Vt. 452; Bird v. Hueston, 10 Ohio St. 418.

² Dwelly v. Dwelly, 46 Me. 377.

³ Ware v. State, 35 N. J. Law, 553.

⁴ Treleaven v. Dixon, Ex'r, 119 Ill. 548, 9 N. E. Rep. 189; Way v. Harriman, 126 Ill. 132, 18 N. E. Rep. 206; Shaw v. Schoonover, 130 Ill. 448, 22 N. E. Rep. 589; Harriman v. Sampson, 23 Ill. App. 159; Rev. St. Ind. 118,

§ 501; Walker v. Steele, 121 Ind. 436, 22 N. E. Rep. 142; Leach v. Fowler, 23 Ark. 143; In re Valentine's Will (Wis.), 67 N. W. Rep. 12; Smith v. Smith (Ill.), 48 N. E. Rep. 96.

⁵ Tucker v. State, 71 Ala. 342.

⁶ Glover v. Suter (Ky.), 38 S. W. Rep. 869; Carroll's Civ. Code, Ky., § 606.

§ 279. Competency to testify against each other — Effect of dissolution of the marriage.— The rule and reason of the law forbidding the testimony of a husband or wife for or against the other is not affected by a dissolution of the marriage. Those communications made confidentially by the husband and wife to each other while married, together with any other information coming to the one or to the other by reason of such confidential relation, must remain and be inviolable through all time. Whether the dissolution be by death or the sentence of a court of competent jurisdiction, the lips of both are nevertheless sealed against intrusion and the veil of secrecy is made to shield from any investigation of privileged facts.¹ But with the dissolution of the marriage by a decree of divorce, all subsequent private communications are unprotected, and the witness may be required to testify concerning same.²

§ 280. Confidential communications — Criminal cases — Party as witness in his own behalf — Scope of cross-examination.— In perhaps most of the states at this day the old common-law rule forbidding the accused to testify in his own behalf has been changed by statute. A defendant may now generally testify in his own behalf, except that the jury may consider

¹ *Elswick v. Commonwealth*, 13 Bush (Ky.), 155; *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224; *Ratcliff v. Wales*, 1 Hill (N. Y.), 63; *Newstrom v. St. Paul & D. R. Co.*, 61 Minn. 78, 63 N. W. Rep. 253; *Griffith v. Griffith*, 163 Ill. 216, 44 N. E. Rep. 820; *Perry v. Randall*, 83 Ind. 143; *Babcock v. Booth*, 2 Hill (N. Y.), 181, 187; *Scott v. Commonwealth*, 94 Ky. 511, 23 S. W. Rep. 219; *Hanselman v. Dovel*, 102 Mich. 505, 60 N. W. Rep. 978; *Monroe v. Twistleton*, *Peake Add. Cas.* 219; *Buckingham v. Roar*, 45 Neb. 244, 63 N. W. Rep. 398; *Johnson v. State*, 27 Tex. App. 135, 11 S. W. Rep. 34; *Mercer v. Patterson*, 41 Ind. 440; *Griffin v. Smith*, 45 Ind. 366; *Denbo v. Wright*, 53 Ind. 226; *Perry v. Randall*, 83 Ind. 143; *Stanley v. Montgomery*, 102 Ind. 102, 26 N. E. Rep. 213; *Mitchel v. Mitchel*, 80 Tex. 101,

15 S. W. Rep. 705; *Herndon v. Triple Alliance*, 45 Mo. App. 426; *Beckett v. Northwestern Masonic Aid Ass'n* (Minn.), 69 N. W. Rep. 923; *State v. Jolly*, 3 Dev. & Bat. (N. C.) 110; *State v. Brittain*, 117 N. C. 783, 23 S. E. Rep. 433; *Sprodling v. Conway*, 51 Mo. 51; *Moore v. Moore*, 51 Mo. 118; *Lingreen v. Ill. Cent. R. R.*, 61 Ill. App. 174; *Owen v. State*, 78 Ala. 425; *Crouse v. Rutledge*, 81 Ill. 266; *Brock v. Brock*, 116 Pa. St. 109, 9 Atl. Rep. 486.

² *Mercer v. Patterson*, 41 Ind. 440; *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224; *Griffin v. Smith*, 45 Ind. 366; *Long v. State*, 86 Ala. 36, 5 S. Rep. 443; *French v. Wade*, 35 Kan. 891, 11 Pac. Rep. 138; *Reed v. Crissey*, 63 Mo. App. 184; *Stein v. Weidman's Adm'r*, 20 Mo. 17; *Scroggin v. Holland*, 16 Mo. 419.

his interest in the result of the trial in weighing his testimony. Under a statute of this kind, a person accused of a crime cannot be compelled, on cross-examination, where he has not testified in his direct examination as to any communications between himself and wife, to answer a question which would call for facts touching such privileged matters.¹ Nor can the wife, where by statute she is a competent witness for her husband in a criminal proceeding against him, be required to testify of facts which would tend to show the illegitimacy of her child.²

§ 281. Competency of one to testify for or against the other under a joint indictment with others.—If several persons are jointly indicted, the wife of any one of them is not a competent witness for any. This is because the evidence would tend to prove either the guilt or innocence of all, under the usual criminal procedure, and this would necessarily include the husband or wife, as the case might be, of the witness.³ The same rule applies where the wife of an accomplice, jointly indicted with the principal, is offered as a witness.⁴ But on a joint indictment against A. and B. for larceny, the wife of B. may testify as to the joint guilt of the parties in order to convict A., B. having already been convicted. In such a case her testimony can do the husband neither good nor harm, and the evidence, therefore, is entirely proper. The reason of the law ceasing, the law also ceases.⁵ Upon the same principle it is correctly held that a wife may testify against any persons

¹ *People v. Mullins*, 88 Cal. 138, 23 Pac. Rep. 229. See also, as throwing light on this question, *Bigler v. Reyher*, 43 Ind. 112; *Duttenhofer v. State*, 43 Ohio St. 91; *Hemenway v. Smith*, 28 Vt. 701; *State v. White*, 19 Kan. 445.

² *Meyer v. State* (Tex. Civ. App.), 41 S. W. Rep. 632.

³ *Dill v. State*, 1 Tex. App. 278; *Blumann v. State*, 33 Tex. Cr. Rep. 43, 21 S. W. Rep. 1027; *State v. Smith*, 2 Ired. (N. C. Law), 402; *Rex v. Frederick*, 2 Str. 1095; *Carr v. State*, 42 Ark. 204; *Commonwealth v. Easland*, 1 Mass. 15; *Commonwealth v. Robinson*, 1 Gray (Mass.), 555; *Casey v. State*, 37

Ark. 67; *Rex v. Locker*, 2 Str. 1095; 1 Hale, P. C. 437; *State v. Anthony*, 1 McCord (S. C. Law), 285; *Rex v. Wainwright*, 5 Esp. 107. See also *Bartlett v. Clough* (Wis.), 68 N. W. Rep. 875.

⁴ *Collier v. State*, 20 Ark. 36; 1 Greenl. Ev., § 407; *State v. Smith*, 2 Ired. (N. C. Law), 402, 405; *Blumann v. State*, 33 Tex. Cr. Rep. 43, 21 S. W. Rep. 1027.

⁵ *Regina v. Williams*, 8 Car. & P. 283; *Carr v. State*, 42 Ark. 204, 207; *State v. Goforth*, 136 Mo. 111, 37 S. W. Rep. 801; *Blumann v. State*, 33 Tex. Cr. Rep. 43, 21 S. W. Rep. 1027.

jointly indicted with her husband after a *nolle prosequi* has been entered as to him.¹ So, the wife of one person separately indicted for the same crime charged against another is a competent witness for the other, where it appears that there is no conspiracy between the two, and where it does not appear which is charged as principal, unless the effect of such testimony would necessarily inure to the advantage of the husband.² And the Louisiana court even goes further and holds that the wife of one jointly indicted with another for a criminal offense is a competent witness against the other under an instruction from the trial court limiting the evidence of the wife to the party accused other than the husband.³ And where two are jointly indicted, the husband or wife may testify against the other after a plea of guilty by the one against whom the evidence would be incompetent.⁴

§ 282. Competency to testify against each other in criminal cases.—Rigid as is the rule of the common law forbidding the testimony of a husband or wife for or against the other, the rule, nevertheless, bends to extreme necessity, and exceptions are made for this reason. One of these exceptions is, either may testify against the other in a criminal prosecution for an injury inflicted by one upon the other.⁵ And a man may be convicted

¹ Woods v. State, 76 Ala. 35. See, too, Morrill v. State, 5 Tex. App. 447.

² Gill v. State, 59 Ark. 422, 27 S. W. Rep. 598; United States v. Addatte, 6 Blatchf. 76; Moffitt v. State, 4 Sneed (Tenn.), 425; State v. Anthony, 1 McCord (S. C. Law), 285; State v. Rainsbarger, 71 Iowa, 746, 31 N. W. Rep. 865; People v. Langtree, 64 Cal. 256, 30 Pac. Rep. 813; State v. Waterman, 1 Nev. 543.

³ State v. Adams, 40 La. Ann. 213, 3 S. Rep. 733; State v. Wright, 41 La. Ann. 600, 6 S. Rep. 135.

⁴ State v. Guest, 100 N. C. 410, 6 S. E. Rep. 253; 1 Whart. Cr. Ev., § 392; 1 Greenl. Ev., § 342; Blumann v. State, 33 Tex. Cr. Rep. 43, 21 S. W. Rep. 1027.

⁵ Lady Lawley's Case, Bull. N. P. 288; Lord Audley's Case, 3 How.

State Tr. 402, 413; State v. Davis, 3 Brev. 3; Rex v. Azire, 1 Str. 633; Soule's Case, 5 Greenl. (Me.) 9; 1 East, P. C. 357; Stein v. Bowman, 13 Pet. 209; Carey v. Gleissner, 58 Wis. 674, 17 N. W. Rep. 398; Mills v. United States, 1 Pin. (Wis.) 73; Bramlette v. State, 21 Tex. App. 611, 2 S. W. Rep. 765; Turner v. State, 60 Miss. 351; United States v. Smallwood, 5 Cranch, C. C. 35; United States v. Jones, 32 Fed. Rep. 569; Parsons v. People, 21 Mich. 509; People v. Sebring, 66 Mich. 705, 33 N. W. Rep. 808; Storrs v. Storrs, 23 Fla. 274, 2 S. Rep. 368; Johnson v. State, 94 Ala. 53, 10 S. Rep. 427; State v. Borden, 6 R. I. 495; State v. Kenyon, 18 R. I. 217, 26 Atl. Rep. 199; Scott v. Commonwealth, 94 Ky. 511, 23 S. W. Rep. 219; State v. Pain, 48 La. Ann. 311, 19 S.

on the testimony of his wife of a forcible abduction in taking and marrying her against her will. This is an act of violence to her person, on the one hand, and, on the other, there is really no marriage, as the consent is lacking.¹ And where the husband has been guilty of any conduct of a violent nature or caused any personal or other injury to the wife such as would make him guilty of a violation of the criminal laws, it is proper that she should be permitted to testify in a prosecution against him for the offense, to the end that justice may be vindicated; for, were it otherwise, it might be practically impossible to convict the husband in such cases, because no one would know of the facts, as a rule, but the husband and wife, and as the husband could not be required to give criminating evidence against himself, he would escape punishment but for the testimony of his wife.² But the husband is not a competent witness to prove an act of criminal intercourse by the wife with another man.³ This is the rule in Michigan under statute.⁴ Nor can the husband show by his own evidence the declarations of his wife in an action against her parents for enticing her away from him,⁵ though the letters written by the wife may be introduced as tending to show her regard for her husband or the contrary.⁶ The wife cannot testify against the husband in a prosecution by the state for the offense of vagrancy.⁷ It is held in Alabama, where the disqualification of interest is removed, that a wife is a competent witness in behalf of her husband in a criminal case against him.⁸ The rule of law allowing such testimony in cases of this nature is such that neither the objections of the wife nor the husband can avail to defeat the admissibility of the evi-

Rep. 138; *State v. Arnold*, 55 Mo. 89; *United States v. Smith*, 4 Cranch, C. C. 659; *Whipple v. State*, 34 Ohio St. 87; *State v. Willis*, 119 Mo. 485, 24 S. W. Rep. 1008.

¹ *Hale*, P. C. 301, 302; *Rex v. Azire*, 1 Str. 633.

² *Kelly v. Drew*, 12 Allen (Mass.), 107, 109; *Commonwealth v. Murphy*, 4 Allen (Mass.), 491.

³ *Commonwealth v. Sparks*, 7 Allen (Mass.), 534; *State v. Welch*, 26 Me. 30; *State v. Gardner*, 1 Root (Conn.), 485; *Commonwealth v. Gordon*, 2

Brewst. (Pa.) 569; *State v. Welch*, 26 Me. 30.

⁴ *Comp. Laws Mich.*, § 5969; *Mathews v. Yerex*, 48 Mich. 361, 12 N. W. Rep. 489; *Gleason v. Knapp*, 56 Mich. 291, 22 N. W. Rep. 865.

⁵ *White v. Ross*, 47 Mich. 172, 10 N. W. Rep. 188.

⁶ *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. Rep. 485.

⁷ *Merriwether v. State*, 81 Ala. 74, 1 S. Rep. 560.

⁸ *State v. Neill*, 6 Ala. 685; *Tucker v. State*, 71 Ala. 348.

dence; but the wife may be compelled to testify regardless of her pleasure in the matter or that of her husband.¹ Where the statute provides that "the husband or wife of any respondent in a criminal prosecution offering himself or herself as a witness shall not be excluded from testifying therein because he or she is the wife or husband of the respondent," the husband or wife may testify in a criminal case against the other, just as though the marital state did not exist.²

§ 283. Competency to testify in prosecutions for crimes committed against the other — Right of objection to testify. Where a husband or wife is guilty of a criminal act towards the other, the injured one is a competent witness against the other to prove the crime, both at common law and under some statutes. Being a competent witness, he or she has no right to decline to testify. For in prosecutions of this kind the law makes such evidence competent, and the witness will not be permitted to defeat or change the rule of evidence by refusing to testify. The rule is established, not for the benefit of either party, but in furtherance of effective punishment of crime by the state. It is founded, in part at least, upon public policy, and is to protect all citizens of the state from lawlessness and to promote and preserve peace and good order. This being true, the witness has no right to take from either party to an action any benefit which may result from evidence which the law, for any reason, deems competent and proper.³

§ 284. Competency to testify — Statutes permitting testimony for each other.— In Texas "the husband and wife may in all criminal cases be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other." Under this statute a witness cannot be cross-examined upon any point except that brought out in the direct examination.⁴

¹ Dumas v. State, 14 Tex. App. 465; Turner v. State, 60 Miss. 351; Bramlette v. State, 21 Tex. App. 611, 2 S. W. Rep. 765; Johnson v. State, 94 Ala. 53, 10 S. Rep. 427.

² State v. Kenyon, 18 R. L. 217, 26 Atl. Rep. 199.

³ Bramlette v. State, 21 Tex. App. 611, 2 S. W. Rep. 765; Turner v. State, 60 Miss. 351.

⁴ Johnson v. State, 28 Tex. App. 18, 11 S. W. Rep. 667; Miller v. State (Tex. Cr. App.), 40 S. W. Rep. 313; Blumann v. State (Tex. Cr. Rep.), 38

But the witness may be rigidly cross-examined on any points thus brought out.¹ Under this law a wife cannot testify on a charge of abortion against her husband alleged to have been committed upon her before marriage; for the crime cannot be against the wife unless she be such at the time of its commission. The subsequent marriage can in no sense be regarded as relating back to the time of the act.²

§ 285. When survivor may testify.—It is no invasion of the policy of the law protecting confidential information possessed by husband and wife for her or him to testify as to any facts which may have come under observation during the marriage, where the information sought to be elicited by such evidence comes to the knowledge of one or the other, not by reason of the confidential relation, but from observation or otherwise, not as a family secret or in mutual confidence. So the rule is, such facts may be proven by the one or the other, one being dead, though occurring during the life-time of both and while the marriage was in force. And it is immaterial whether the marriage has been dissolved by death or divorce.³ Accordingly a widow may testify to any facts learned during the time of her marriage, not of a confidential nature, in behalf of herself and children, the heirs of her husband.⁴ A di-

S. W. Rep. 337; *Jones v. State* (Tex. Cr. Rep.), 40 S. W. Rep. 807; *Washington v. State*, 17 Tex. App. 197; *Greenwood v. State*, 35 Tex. 587; *Creamer v. State*, 34 Tex. 173.

¹ *Greenwood v. State*, 35 Tex. 587; *Creamer v. State*, 34 Tex. 173. See also *Ex parte Henderson* (Utah), 21 Pac. Rep. 396.

² *Miller v. State* (Tex. Cr. Rep.), 40 S. W. Rep. 313.

³ *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. Rep. 1075; *Spivey v. Platon*, 29 Ark. 603; *Ratcliff v. Wales*, 1 Hill (N. Y.), 63; *Babcock v. Booth*, 2 Hill (N. Y.), 181, 187; *Spradling v. Conway*, 51 Mo. 51; *Monroe v. Twistleton*, Peake, Add. Cas. 219, 220; *Stein v. Weidman's Adm'r*, 20 Mo. 18; 1 Greenl. Ev., § 388; *Avenson v. Lord Kinnaird*, 6 East, 188; *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224; *May v.*

May, 8 Ired. (N. C.) 27; *Rudd v. Peters*, 41 Ark. 177; *Smith v. Potter*, 27 Vt. 304; *Edgell v. Bennett*, 7 Vt. 534. See also *Rutland & Burlington R. R. Co. v. Lincoln*, 29 Vt. 206. The contrary was held in *State v. J. N. B.*, 1 Tyler (Vt.), 36, but the case was overruled not long afterwards. *State v. Phelps*, 2 Tyler (Vt.), 374.

⁴ *Sherwood's Adm'r v. Hill*, 25 Mo. 391; *Coffin v. Jones*, 13 Pick. (Mass.) 441; *Scroggin v. Holland*, 16 Mo. 419; *Powell v. Powell*, 114 Ill. 329, 2 N. E. Rep. 162; *Sanders v. Hendricks*, 5 Ala. 224; *Wells v. Tucker*, 3 Bin. (Pa.) 366; *Cornell v. Vanarstdalen*, 4 Pa. St. 364; *Williams v. Abel*, 7 Vt. 503. See, too, *Lockwood v. Mills*, 39 Ill. 602; 1 Greenl. Ev., § 338; *Young v. Seuft*, 153 Pa. St. 352; *Poundstone v. Jones* (Pa.), 41 Atl. Rep. 21.

vorced wife may testify as to facts occurring before the marriage, even as a witness against her former husband, in a criminal prosecution by the state.¹ And in an action on an insurance policy on the life of the wife, her declarations are competent, as part of the *res gestæ*, to prove the state of her health at the time the insurance was applied for, in order to show a fraud perpetrated by her on the company in procuring the policy.² But under the Missouri statute, which provides that a married woman shall not be permitted while the relation of marriage exists, or subsequently, to testify to any admissions or conversations of her husband, whether made to herself or third parties, she cannot testify to acts or declarations made by the husband at the time of signing an application for an insurance policy.³

§ 286. Competency to testify as to matters of agency.—Another very important exception to the general rule of disability of husband or wife to testify is that they may testify for or against each other as to facts and transactions concerning the acts of one as the agent of the other, where the disability of interest is removed and such evidence is not forbidden by statute. This does no violence to the fiction of unity in the husband and wife, for the wife, in thus acting for her husband, recognizes his entity and authority, and such acts in no way conflict with either her duty or fealty to him.⁴ But in order that such testimony be permissible the party testifying must

¹ *Inman v. State* (Ark.), 47 S. W. Rep. 558.

² *Avenson v. Kinnaird*, 6 East, 188.

³ *Herndon v. The Triple Alliance*, 45 Mo. App. 426.

⁴ *Orcutt v. Cook*, 37 Vt. 515; *Lunay v. Vantyne*, 40 Vt. 501; *Martin v. Hurlburt*, 60 Vt. 364, 14 Atl. Rep. 648; *Reed v. Crissey*, 63 Mo. App. 184, 1 Mo. App. Rep. 742; *Arndt v. Harshaw*, 53 Wis. 269, 10 N. W. Rep. 390; *Littlefield v. Rice*, 10 Metc. (Mass.) 281; *Sumner v. Cooke*, 51 Ala. 521; *Long v. Walero*, 47 Ala. 624; *Reynolds v. Chinoweth*, 68 Vt. 104, 34 Atl. Rep. 36; *Geo. Taylor Com. Co. v. Bell*, 62 Ark. 26, 34 S. W. Rep. 80; *Sand. & H. Dig.* (Ark.) § 2916; *Birdsall v. Dunn*, 16 Wis. 250; *Carney v. Gleissner*, 58 Wis. 674, 17 N. W. Rep. 398; *Santer v. Scrutchfield*, 28 Mo. App. 150; *Stanton v. Ryan*, 41 Mo. 510; *American Express Co. v. Lankford* (Ind. Ter.), 46 S. W. Rep. 183; *Wiggins v. Foster* (Kan.), 55 Pac. Rep. 350. See, along the same line, *Pedley v. Wellesley*, 3 C. & P. 558. The rule is the same in Connecticut under an enabling statute of that state. *Stanton v. Wilson*, 3 Day (Conn.), 37, 56. But is denied in Vermont. *Seargent v. Seward*, 31 Vt. 509. See also *Carr v. Cornell*, 4 Vt. 116.

be actually such agent. And agency is not established in a wife by showing that she occasionally looks after her husband's domestic animals and like matters, for these naturally are incident to her domestic duties or privileges as wife.¹ Not only must the witness be the agent *bona fide*, but the acts testified to must come legitimately within the scope of the agency.² But a husband, acting as the agent of his wife, may testify as to any facts legitimately establishing such agency.³ In Massachusetts the law forbids the testimony of a husband or wife to any private conversations whatever with each other.⁴ And this is construed to mean, not only communications which are in their nature private and confidential, but private conversations with each other on matters of business relating to the agency of one or the other.⁵ But where the wife may testify to her acts as agent of her husband, she may so testify after his death.⁶ And her acts and declarations constituting him as her agent are not privileged.⁷

§ 287. Agency — Competency to testify — Statutory regulations.—The rule admitting the testimony of husband or wife as to acts of agency by the one for the other, when not allowed by implication where the disability of interest is abrogated by local law, is usually founded upon some statute expressly permitting it. These statutes usually provide, in substance, that either may be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent.⁸ Under the Vermont statute it is held that acts done by the wife in the presence of the husband and

¹ *Garrison v. Barnes*, 42 Ill. App. 21.

² *Carney v. Gleissner*, 58 Wis. 674, 17 N. W. Rep. 398; *Birdsall v. Dunn*, 16 Wis. 235; *Council Grove O. C. & O. Ry. Co. v. Center*, 42 Kan. 483, 22 Pac. Rep. 574; *Geo. Taylor Com. Co. v. Bell*, 62 Ark. 26, 34 S. W. Rep. 80. As tending to establish the same theory, see, further, *Hazer v. Streich*, 92 Wis. 505, 66 N. W. Rep. 720.

³ *American Express Co. v. Lankford* (Ind. Ter.), 46 S. W. Rep. 183.

⁴ Pub. St. Mass., ch. 169, § 18, cl. 1. See also *Commonwealth v. Cleary*, 152 Mass. 491, 25 N. E. Rep. 834; *Kelly*

v. Andrews (Iowa), 71 N. W. Rep. 251; Code Iowa, § 3642; *Dexter v. Booth*, 2 Allen (Mass.), 559; *Brown v. Wood*, 121 Mass. 137.

⁵ *Commonwealth v. Hays*, 145 Mass. 289, 14 N. E. Rep. 151; *Kelly v. Andrews* (Iowa), 71 N. W. Rep. 251.

⁶ *Robnett v. Robnett*, 43 Ill. App. 191.

⁷ *Schmeid v. Frank*, 86 Ind. 250.

⁸ Acts Vt., 1886, No. 45; Acts Vt., 1858, No. 15; Sand. & H. Dig. (Ark.), § 2916, subd. 4; *Darrier v. Darrier*, 58 Mo. 222.

by his direction do not constitute the wife the agent of the husband so as to let in her testimony as such; but acts under these circumstances are rather in the nature of acts of a servant.¹ Nor is the wife competent to testify as agent to the state of the accounts of her husband which have been kept by her from memoranda made by the husband.² The fact that the wife may also act as the agent of the party with whom she is dealing will not militate against the idea that she is a competent witness for him as to the acts and doings of herself in carrying out her authority as his agent, for the law fully recognizes dual agencies in all proper cases.³ So the husband is a competent witness to prove the nature, character and extent of any investments he may have made with money belonging to his wife while acting as agent for her.⁴

§ 288. Competency to testify — Are competent unless actually married.— In order that the rule governing the admissibility of the testimony of a husband or wife be effective in any case, it is necessary that the parties be actually and lawfully married. For until then they are not husband and wife. It is not enough that they go about living together in an illicit relation, though apparently as husband and wife. Nor is the rule changed because they may call themselves husband and wife, if they really are not married, for the relation is not established by the mere declaration of the parties. They must

¹ *Bates v. Sabin*, 64 Vt. 511, 24 Atl. Rep. 1013.

² *Eastabrooks v. Prentiss*, 34 Vt. 457; *Bates v. Sabin*, 64 Vt. 511, 24 Atl. Rep. 1013.

³ *Martin v. Hurlburt*, 60 Vt. 364, 14 Atl. Rep. 649.

⁴ *Leete v. State Bank of St. Louis*, 115 Mo. 184, 21 S. W. Rep. 788, overruling the earlier cases of *Williams v. Williams*, 67 Mo. 61, and *Wheeler v. Tinsley*, 75 Mo. 458, on this point. The statute construed in the later case was Rev. St. Mo., § 8922, as follows: "No married man shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of or against his wife, whether he be joined with her or not as a

party, or is connected with any matter of business or business transaction, where the transaction or business was made with or was conducted by such married man as the agent of his wife." And under this statute a wife may testify in a cause brought by the executor of her husband on a contract made by her as his agent. *Reed v. Crissey*, 63 Mo. App. 184, 1 Mo. App. Rep. 742. The intervening death can have no effect on the admissibility of such evidence, as its legality is taken from the statute permitting it. It is not permitted because both parties are alive. Its competency endures so long as the witness lives to testify.

so regard each other in fact, and if such is not the case, either may be required to testify for or against the other in a civil or criminal case.¹ This rule has even been extended to a case where the husband had not for years lived with his wife, and who testified, without objection, to her adultery.² In a prosecution for polygamy, the second wife may give in evidence letters of a confidential nature written by the husband and tending to prove the existence of the first marriage, or any other private communications between them, as the second marriage would be void and could not serve to assure the parties thereto of any privilege given to the husband and wife.³

§ 289. **Competency to testify in divorce cases.**—At common law neither the husband nor wife could testify for or against the other in an action for divorce. There was no exception in favor of cases of this nature.⁴ But proceedings for divorce are usually brought in equity, which courts, by reason of their peculiar jurisdiction and powers, usually entertain jurisdiction in such cases, and in which tribunals such jurisdiction is often lodged by statute. A practice has grown up in many of the states permitting the evidence of the parties to the record in divorce cases *ex necessitate*, perhaps in part, and partly no doubt, because in equity the oneness of the husband and wife is not so strictly regarded as at law.⁵ In Rhode Island it is enacted that either party to a proceeding for a divorce may testify in the case.⁶ But as there is also a statute in this state

¹ Wells v. Fletcher, 5 Car. & P. 12; Bathews v. Galindo, 3 Car. & P. 238; People v. Alviso et al., 55 Cal. 230.

² State v. Marvin, 35 N. H. 28. See Woods v. State, 76 Ala. 36.

³ Commonwealth v. Caponi, 155 Mass. 534, 30 N. E. Rep. 82; Cole v. Cole, 153 Ill. 585, 38 N. E. Rep. 702; Morrill v. Palmer, 68 Vt. 1, 33 Atl. Rep. 829; State v. Shreve (Mo.), 38 S. W. Rep. 548; 1 Greenl. Ev., § 339; Whart. Ev., § 421; State v. Johnson, 12 Minn. 476; Finney v. State, 3 Head (Tenn.), 544; Bathews v. Galindo, 4 Bing. 610.

⁴ Scarborough v. Scarborough, 54 Ark. 20, 14 S. W. Rep. 1098; King v

King, 42 Mo. App. 454; Ayers v. Ayers, 28 Mo. App. 97; Miller v. Miller, 14 Mo. App. 418; Buck v. Ashbrook, 51 Mo. 539; Dwelly v. Dwelly, 46 Me. 377.

⁵ Schnabel v. Betts, 23 Fla. 178, 1 S. Rep. 692; Scarborough v. Scarborough, 54 Ark. 20, 14 S. W. Rep. 1098; Appeal of Spitz, 50 N. J. Law, 464, 14 Atl. Rep. 776; Rie v. Rie, 34 Ark. 37; Kurtz v. Kurtz, 38 Ark. 119; Brown v. Brown, 38 Ark. 324; Smith v. Smith, 77 Ind. 80.

⁶ Pub. Laws R. I., April, 1896, ch. 581, § 1. Similar laws exist in many of the states.

forbidding the husband or wife to disclose any communication during marriage or give evidence tending to criminate the other,¹ neither can testify in such proceeding to facts which would criminate the other, though such facts might constitute legal ground for divorce.² In Pennsylvania, by statute,³ either party in a divorce proceeding, when personal service is had, or the opposing party enters appearance, is competent to testify. And under this law it is held that the wife may testify to the conduct and statements of her husband which bear upon the issues in such a proceeding.⁴ But such statutes should receive a strict construction, and the evidence of the wife as to such facts is not admissible where the husband was only summoned by warning order, though he may have had actual service in a place beyond the jurisdiction of the courts of the state where the action is pending.⁵ In Michigan, by statute, parties to an action for divorce may be permitted to testify touching the issues, but only with the sanction of the court where the same is pending.⁶ By statute in other states, the parties to a divorce case may testify,⁷ but not as to confidential communications to each other made during the marriage or by reason thereof.⁸

§ 290. Competency to testify for or against each other when one or both are parties.— Ordinarily a husband or wife may testify as to acts or transactions between themselves when the one or the other is merely a nominal party against whom no effective judgment can be rendered.⁹ And it has

¹ Pub. St. R. I., ch. 214, § 36. See, too, Const. U. S., Fifth Amendment; Constitution of North Carolina, § 11; Code N. C., § 1354; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. Rep. 195.

² Briggs v. Briggs (R. I.), 26 Atl. Rep. 198; Smith v. Smith, 116 N. C. 386, 21 S. E. Rep. 196.

³ Act Pa., May 23, 1887, clause c, § 5.

⁴ Seitz v. Seitz, 170 Pa. St. 71, 32 Atl. Rep. 578.

⁵ Payne v. Payne (Com. Pl.), 5 Pa. Dist. Rep. 188.

⁶ Comp. Laws Mich., § 4927; Hamilton v. Hamilton, 37 Mich. 603.

⁷ 1 Starr & C. Ann. St. Ill., p. 1077;

Griffith v. Griffith, 163 Ill. 216, 44 N. E. Rep. 820; Rev. St. Mo., 1889, § 8918; Moore v. Moore, 51 Mo. 118; State v. Willis, 119 Mo. 485, 24 S. W. Rep. 1008; State v. Evans (Mo.), 39 S. W. Rep. 462; Smith v. Smith, 77 Ind. 80; Hutchason v. State, 67 Ind. 449.

⁸ Moore v. Moore, 51 Mo. 118; Ayers v. Ayers, 28 Mo. App. 97.

⁹ Gerz v. Weber, 151 Pa. St. 396, 35 Atl. Rep. 32; Rudd v. Peters, 41 Ark. 177; Nolen v. Harden, 43 Ark. 307; Nicholas v. Austin, 82 Va. 817, 1 S. E. Rep. 132; Ratliff v. Vandikes, 89 Va. 307, 15 S. E. Rep. 864; Dickinson v. McGraw, 151 Pa. St. 93, 24 Atl. Rep. 1043.

even been held that a widow may testify in an action against the executors of her late husband concerning a promise made by him to them in his life-time, when the same was not made known to her in matrimonial confidence.¹ A married woman may interplead of her right to property seized by a third party as that of her husband, and is a competent witness in her own behalf on the trial of the issues, though her husband could not himself testify for her in such a case. Such action becomes practically a contest between the wife and the third party, and her evidence tending to establish her claim is really against the latter, not the husband.² And the wife may defend an action to foreclose a mortgage on the lands of her husband to the extent of her statutory dower or homestead interest, and may testify in her own behalf, and concerning her own right only in such lands, though both husband and wife are made parties to the proceedings.³ In short, the right of the husband or wife to testify in their own several behalf, where the common-law disability of interest has been removed, cannot be defeated by joining them in an action, nor where they properly or necessarily join themselves as parties.⁴

In an action by a husband as *prochein ami* of his infant child, under a statute permitting an infant to thus sue, the wife is a

¹ *Railway Co. v. Thompson*, 107 Ind. 442, 8 N. E. Rep. 18; *Alexandria Mining & Exploring Co. v. Irish* (Ind. App.), 44 N. E. Rep. 680; *Beveridge v. Minter*, 1 Car. & P. 364; *Parcell v. McReynolds*, 71 Iowa, 623, 33 N. W. Rep. 139. See, apparently *contra*, *May v. May*, 3 Ired. (N. C. Law), 27. And see, too, *In re Buckman's Will*, 64 Vt. 313, 24 Atl. Rep. 252.

² *Sembre v. Sembre*, 45 La. Ann. 117, 11 S. Rep. 942; *Cosgrove v. His Creditors*, 41 La. Ann. 278, 6 S. Rep. 585; *Kelly v. Hale*, 59 Ill. App. 568; *Berlin v. Cantrell*, 33 Ark. 611; *Evans v. Evans*, 155 Pa. St. 572, 26 Atl. Rep. 755. See, further, *Vicknair v. Troclair*, 45 La. Ann. 373, 12 S. Rep. 486; *Bowman v. Reinhart*, 89 Va. 435, 16 S. E. Rep. 279.

³ *Klenk v. Knoble*, 37 Ark. 298. See, too, *Hayes v. Va. Mut. Protec-*

tion Ass'n, 76 Va. 225; *Kelly v. Hale*, 59 Ill. App. 568. And in a joint action by a husband and wife for damages, either may testify in behalf of the other under a statute permitting this, though neither could testify for or against the other in the very same action. *St. Louis, I. M. & S. Ry. Co. v. Amos*, 54 Ark. 159, 15 S. W. Rep. 362; *Schnabel v. Betts*, 23 Fla. 178, 1 S. Rep. 692.

⁴ *Klenk v. Knoble*, 37 Ark. 298; *St. Louis, I. M. & S. Ry. Co. v. Amos*, 54 Ark. 159, 15 S. W. Rep. 362; *Hayes v. Association*, 76 Va. 225; *Farley v. Tillar*, 81 Va. 275; *Clouse v. Elliott*, 71 Ind. 302; *Shantz v. Stoll*, 34 La. Ann. 1237; *Bell v. Railway Co.*, 86 Mo. 599; *Snell v. Bray*, 56 Wis. 156, 14 N. W. Rep. 14; *Hackett v. Bonnell*, 16 Wis. 417; *Buck v. Ashbrook*, 51 Mo. 539.

competent witness in the case, as the child and his rights only are involved. This is true even though the husband is liable, in law, for the costs in these cases if the suit is unsuccessful.¹ And again, where the wife sues as executor, the husband is a competent witness in the case as to any matters not pertaining to the confidential relation.² The rule of exclusion is only applicable to cases in which the interest of the one is to be affected by the testimony of the other.³ Indeed, the tendency of the modern cases is rather to relax than narrow the rule.⁴ But, though a husband or wife may testify in behalf of each other when joined in an action to which the other is only a nominal party, still the husband or wife cannot be compelled to testify in such an action, though a party *eo nomine* only, where the testimony would directly affect the rights and interests of the other.⁵ The same rule obtains where the husband and wife are sued on a cause of action in which the liability of both will be established if the liability of one is.⁶ So, where an action is brought against both, and is subsequently dismissed as to the wife, she cannot then testify, as the evidence must necessarily affect her husband.⁷ Usually, where the disability of interest has been removed, the husband or wife of a co-heir will be permitted to testify for or against such co-heir, or his creditors, concerning the interest of the heir in the estate.⁸ In an action by a wife on an obligation, her husband cannot, over her ob-

¹ St. Louis, L. M. & S. Ry. Co. v. Rex-road, 59 Ark. 180, 26 S. W. Rep. 1037; Lapleine v. Morgan's L. & T. R. & S. Co., 40 La. Ann. 663, 4 S. Rep. 875; Potter v. Stamfli, 2 Kan. App. 788, 44 Pac. Rep. 46; Bonnett v. Stowell, 37 Vt. 260; Belk v. Cooper, next friend, 34 Ill. App. 649.

² Van Fleet v. Stout, 44 Kan. 526, 24 Pac. Rep. 960.

³ Thompson v. Commonwealth, 1 Metc. (Ky.) 13; Carr v. State, 42 Ark. 204, 206; Harrington v. City of Sedalia, 98 Mo. 583, 12 S. W. Rep. 342; Thompson v. Silvers, 59 Iowa, 670, 13 N. W. Rep. 854; Stephenson v. Cook, 64 Iowa, 265, 20 N. W. Rep. 182.

⁴ Van Fleet v. Stout, 44 Kan. 526, 24 Pac. Rep. 960; Belk v. Cooper, 34 Ill. App. 649; Mueller v. Rebham, 94

Ill. 142; State v. Buffington, 20 Kan. 599; McCartney v. Spencer, 26 Kan. 62; Higbee v. McMillan, 18 Kan. 133; Birdsall v. Dunn, 16 Wis. 250; People v. Langtree, 64 Cal. 256, 30 Pac. Rep. 813.

⁵ Burrell Township v. Unchaper, 117 Pa. St. 353, 11 Atl. Rep. 619; Radford v. Fowlkes, 85 Va. 820, 8 S. E. Rep. 817; McEwen v. Shannon, 64 Vt. 583, 25 Atl. Rep. 661; Labree v. Wood, 54 Vt. 452; Banister v. Ovitt, 64 Vt. 580, 24 Atl. Rep. 1117.

⁶ Jones v. Degge, 84 Va. 685, 5 S. E. Rep. 799.

⁷ Kusch v. Kusch, 114 Ill. 353, 32 N. E. Rep. 267.

⁸ Boisse v. Dickson, 31 La. Ann. 750; Starns v. Hadnot, 45 La. Ann. 318, 12 S. Rep. 561.

jection, be required to testify for the adverse party under a statute making husband and wife competent witnesses "in a civil action or proceeding one against the other."¹ But in an action by a wife for a personal injury, the husband is a competent witness to prove the physical condition of the wife just after the occurrence, from which the jury may infer pain and suffering,² though the oral declarations of the wife as to pain could not be shown.³

§ 291. Competency of wife to testify as garnishee.—Where the judgment creditors of the husband sue out writs of garnishment against the wife, seeking thereby to uncover any property of the husband which she may have in her hands or control, it seems that she can be required to answer fully as to such matters. The theory of this is, it is not an injury to the husband to have his property subjected to the satisfaction of his obligations, and that such a proceeding is in the nature of a direct action against the wife to compel her to disclose any property of the husband which she may possess that it may be applied on the debts of the husband.⁴ Another reason, perhaps, whether controlling or not, is that the privacy of communications between husband and wife should not be protected when to do so would enable the party ordinarily entitled to protection in this respect to perpetrate a fraud.

§ 292. Incompetency to testify — Waiver.—A party to an action may waive the privilege of objecting to the testimony of wife or husband if he sees fit so to do. And where one calls the wife or husband in a case and has the oath of a witness administered and asks the witness questions touching the issues, this will operate as a conclusive waiver of the incompetency so far as the party calling the witness is concerned.⁵ But though

¹ Code Iowa, § 3641; *Ward v. Dickson* (Iowa), 65 N. W. Rep. 997.

² *Savannah, F. & W. Ry. Co. v. Wainwright* (Ga.), 25 S. E. Rep. 622.

³ *Atlanta St. Ry. Co. v. Walker*, 93 Ga. 462, 21 S. E. Rep. 48.

⁴ *Thompson v. Silvers*, 59 Iowa, 670, 13 N. W. Rep. 854.

⁵ *Columbia & P. S. R. R. Co. v. Hawthorn*, 3 Wash. 353, 19 Pac. Rep. 24;

Ficken v. State (Ga.), 25 S. E. Rep. 925; *Parkhurst v. Berdell*, 110 N. Y. 386, 18 N. E. Rep. 123; *American Express Co. v. Lankford* (Ct. App. Ind. Ter.), 39 S. W. Rep. 817; *People v. Hays*, 140 N. Y. 484, 35 N. E. Rep. 95; *Kimball v. Thurman* (Ky.), 33 S. W. Rep. 834; *Miller v. Miller*, 92 Va. 510, 23 S. E. Rep. 891. See also *People v. Fultz*, 109 Cal. 258, 41 Pac. Rep. 1040.

the confidential communication be waived in one trial, objection for this reason may nevertheless be made to the evidence of the same witness in another trial of the same case.¹ The objection should of course be made at the time the improper testimony is offered. It will be too late to permit it to be given and move its exclusion afterwards, as this would practically be experimenting with such evidence.² Nor can the party who has thus experimented raise the question of incompetency for the first time on appeal.³ Where, in a criminal trial, the wife, though incompetent, is nevertheless permitted, by consent of the parties, to testify in behalf of her husband, who is jointly indicted with others, she may be impeached on cross-examination by being asked questions, the answers to which tend to prove the guilt of her husband, the cross-examination being limited strictly to the impeaching effect of such answers.⁴ In an action by a husband and wife against an express company for the value of a package of jewelry lost by the defendant, after it had examined the husband rigidly on cross-examination, in an effort to elicit evidence favorable to it, without objection to the competency until the cross-examination was completed, which showed a want of any interest in the husband in the subject-matter of the litigation, the defendant objected to the evidence because it was shown that the husband had no interest in the suit. Thereupon a nonsuit was taken as to him. The defendant then moved to exclude the testimony because the case then stood in the name of the wife alone, and the husband's evidence would necessarily redound to her interest or advantage. But the learned court very correctly held that the defendant could not thus speculate upon the effect of the husband's testimony, and, finding it injurious to its case, have it stricken out.⁵

§ 293. Competency to testify against each other in criminal cases — Statutory regulations — Crimes against each other.—In Iowa it is provided by statute that “neither the

¹ Grattan v. Insurance Co., 92 N. Y. 274; Breisenmeister v. Supreme Lodge K. of P., 81 Mich. 525, 45 N. W. Rep. 977.

² Breisenmeister v. Supreme Lodge K. of P., 81 Mich. 525, 45 N. W. Rep. 977.

³ Pease v. Hunt, 60 Ill. App. 585.

⁴ Ficken v. State (Ga.), 25 S. E. Rep. 925.

⁵ American Express Co. v. Lankford (Ct. App. Ind. Ter.), 39 S. W. Rep. 817.

husband nor wife shall in any case be a witness against the other, except in a criminal proceeding for a crime committed by one against the other, or in a civil action or proceeding, one against the other; but they may in all civil and criminal cases be witnesses for each other.”¹ Under this statute, which has some features of the common-law rule, the first wife is a competent witness for the state in a prosecution against the husband for bigamy.² Likewise, the husband is a competent witness in a criminal prosecution by the state against his wife for adultery.³ Under a like statute in Texas, it was formerly held that the crime of incest, bigamy, adultery, etc., committed by the wife or husband with another, was a crime against the other, within the meaning of the statute.⁴ But this rule has been changed, and now a wife cannot be made a witness, upon whose testimony the husband may be convicted of such crimes, as they are construed not to be against the other within the meaning of the statute.⁵ In Indiana the husband or wife “injured by the offense committed” is a competent witness against the other; and the burning of the barn of the husband by the wife is such an injury as to make him competent to testify against her in a prosecution therefor.⁶ In Michigan the statute provides that “a husband may not be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent, except in cases where the cause of action grows out of a personal wrong done by one to the other. . . . In any action instituted by the husband or wife in consequence of adultery, the husband and wife shall not be compelled to testify.”⁷ The supreme court of this state holds that bigamy on the part of the husband is not a wrong to the wife, within the meaning of the statute.⁸ Nor is an assault by the husband upon the daughter of the wife such an

¹ Code (Iowa), § 4631.

² *State v. Sloan*, 55 Iowa, 217, 7 N. W. Rep. 516.

³ *State v. Bennett*, 31 Iowa, 24.

⁴ *Morrill v. State*, 5 Tex. App. 447; *Roland v. State*, 9 Tex. App. 277.

⁵ *Compton v. State*, 13 Tex. App. 271.

⁶ *Jordan v. State*, 142 Ind. 422, 41 N. E. Rep. 817.

⁷ How. Ann. St. (Mich.), § 7546. And see Code Civ. Proc. (Utah), § 1156.

⁸ *People v. Quanstrom*, 93 Mich. 254, 53 N. W. Rep. 165; *People v. Isham* (Mich.), 67 N. W. Rep. 819. The first above case was by a divided court; and it was held in the last that the husband of the woman with whom he is accused of committing adultery might testify to his marriage with such woman.

injury.¹ But a woman may, in an action by the state against her husband on a charge of assault and battery upon her, testify not only to the actual striking, but to all the facts and circumstances attending the act.² The supreme court of the United States holds that bigamy on the part of the husband is not such a crime against the wife as would authorize her to testify against the husband in a prosecution for this crime, under a statute forbidding a wife to testify against her husband without his consent, except in cases of physical injury to her person.³ It seems, therefore, that the weight of authority on this question is with the contention that the husband or wife may not testify in proceedings against the other for adultery, bigamy, etc. That the statutes invading the common law will not receive a construction beyond the clear and express change made; and that, at common law, such testimony was not admissible unless there was a violent act by one against the other, such as would amount to a crime or offense against the state. That the words "crime" and "injury," as used in these statutes, mean practically the same thing, and do not enlarge the common-law rule to the extent of embracing an injury or crime to the sensibilities.

§ 294. Privileged communications — Admissibility when known to third parties.—The most confidential communications between husband and wife may be produced in evidence, even against their objections, when it is done through a third party who has become aware of the confidential facts by hearing them made either by the husband or wife, whether secretly or otherwise.⁴ But this rule does not hold good where

¹ *People v. Westbrook*, 94 Mich. 629, 54 N. W. Rep. 486.

² *Doolittle v. State*, 93 Ind. 272.

³ *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. Rep. 165. The same doctrine is announced in *Minnesota State v. Armstrong*, 4 Minn. 335. See, too, to similar effect, *Overton v. State*, 43 Tex. 616. *Contra*, *Lord v. State*, 17 Neb. 526, 23 N. W. Rep. 507; *State v. Sloan*, 55 Iowa, 217, 7 N. W. Rep. 516; *Bohner v. Bohner*, 46 Neb. 204, 64 N. W. Rep. 700. And in Indiana the tes-

timony of the wife in suits by the husband for her seduction is forbidden by statute. Acts Indiana 1879, p. 245; *Hutchason v. State*, 63 Ind. 449.

⁴ *State v. Buffington*, 20 Kan. 599, 614; *Lyon v. Proutty*, 154 Mass. 488, 28 N. E. Rep. 908; *Lloyd v. Pennie*, 50 Fed. Rep. 4; *State v. Hoyt*, 47 Conn. 518; *Commonwealth v. Griffin*, 110 Mass. 181; *Rex v. Simons*, 6 Car. & P. 540; *State v. Center*, 85 Vt. 378, 386; *People v. Hays*, 140 N. Y. 484, 85 N.

the communications have been testified to by the husband or wife in another trial. This is not such declaration or admission in the presence of third parties as is contemplated by the law, though the evidence is produced without objection from the party having the right to object.¹ The rule applies to instances where confidential letters written by husband or wife to the other come into the possession of strangers or third parties. The rule of privilege is protected only so long as the privileged communication is in the control of either the husband or wife.² The evidence must be such that but for the privilege it would be competent. It is not allowable to introduce evidence which is incompetent because it is about facts of a confidential nature between husband and wife which have become known, either directly or by being overheard by some third person.³ And the rule itself is denied in Georgia, where the statute provides that all communications between husband and wife are absolutely forbidden as evidence from motives of public policy.⁴ Like rulings are made in other states upon common-law principles.⁵ Nor will the fact that a witness is compelled to reveal such communications on the stand make them competent.⁶ And in any event, the evidence of private communications between husband and wife, testified to by third persons, where the information has been obtained by eavesdropping, must appear to a jury as being very inferior in dignity; for one who would thus steal what he has no real right to learn or know might waver some or even depart from the truth on the witness stand. These communications, confi-

E. Rep. 951; *State v. Gray*, 55 Kan. 135, 39 Pac. Rep. 1050; *People v. Marble*, 88 Mich. 117; *Herrick v. Odell*, 29 Mich. 47. See further along the same line, *Springer v. Bryan*, 137 Ind. 15, 36 N. E. Rep. 361; *Cotton v. State*, 87 Ala. 75, 6 S. Rep. 396; *House v. House*, 61 Mich. 69, 27 N. W. Rep. 858; *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502; *In re McArthy's Will*, 55 Hun, 7, 8 N. Y. S. 578; *Hay v. Morris*, 13 Gray (Mass.), 519; *Young v. Hurst* (Tenn. Ch. App.), 48 S. W. Rep. 355.

¹ *Kelly v. Andrews* (Iowa), 71 N. W. Rep. 251.

² *State v. Hoyt*, 47 Conn. 518; *State v. Buffington*, 20 Kan. 599; *Lloyd v. Pennie*, 50 Fed. Rep. 4; *State v. Ulrich*, 110 Mo. 350, 19 S. W. Rep. 656.

³ *People v. Hays*, 140 N. Y. 484, 35 N. E. Rep. 951; *Commonwealth v. Griffin*, 110 Mass. 181.

⁴ Code Ga., § 3797; *Wilkerson v. State*, 91 Ga. 729, 17 S. E. Rep. 990.

⁵ *Seldon v. State*, 74 Wis. 271, 42 N. W. Rep. 218; *Scott v. Commonwealth*, 94 Ky. 511, 23 S. W. Rep. 219.

⁶ *Scott v. Commonwealth*, 94 Ky. 511, 23 S. W. Rep. 219.

dential and private in their nature, are not supposed to be revealed by husband and wife in the presence of third persons, but only when no one is thought to be near. They cannot be obtained ordinarily without a studied prying into such private affairs by the witness, and endeavoring to learn things he must know would not be voluntarily made known to him. Certainly such evidence should never receive the same credit as the voluntary admissions of the person to be affected.

§ 295. Evidence — Competency of, to affect third parties. Where it becomes necessary to prove a fact affecting the rights or legal liability of a third party by a husband or wife, this may be done, provided the privacy of the relation is not invaded. And this is true though, in so testifying, a corresponding duty or liability is shown in the husband, if the husband or wife to be charged is not a party to the action. It is not all testimony against or for the other that is forbidden, but only such as, in the peculiar case in which the evidence is offered, would tend to affect the husband or wife. If they are not parties, the evidence of neither could affect the other; though the same identical facts in a case in which the one to be affected by the testimony is a party would establish a legal liability, or otherwise affect him or her.¹ And this is true, it has been held, though the evidence thus brought out would tend to criminate the other.² But if the witness object to answering such questions, the court will not compel an answer.³ The reason of the rule is, the evidence so admitted cannot be introduced in a proceeding where it will directly affect the rights of one or the other. This reasoning, however, has been the subject of some criticism. "If there is soundness in the reason which is given in the books for holding incompetent the husband or the wife to give, as against each other, evidence, because it may be the means of implacable discord between them, it is certainly dif-

¹ Higbee v. McMillan, 18 Kan. 133; Mercer v. Patterson, 41 Ind. 440; Griffin v. Smith, 45 Ind. 366; Denbo v. Wright, 53 Ind. 226; Ex parte James, 1 P. Wms. 610; Fitch v. Hill, 11 Mass. 286; Williams v. Johnson, 1 Str. 504; Dale v. Johnson, 1 Str. 568; Nolen v. Harden, 43 Ark. 307; Starns v. Had-

not, 45 La. Ann. 318, 12 S. Rep. 561; Wheeler v. Campbell, 68 Vt. 98, 34 Atl. Rep. 35. See also Hill v. North, 34 Vt. 604.

² State v. Bridgeman, 49 Vt. 202; 1 Greenl. Ev., § 342; State v. Briggs, 9 R. L. 361.

³ State v. Briggs, 9 R. L. 361.

ficult to perceive how that discord and dissension will fail to arise when in collateral proceedings testimony should be given by one which charges directly upon the other the same crime for the commission of which the party on trial is indicted.”¹ But the weight of authority seems clearly to the contrary. That matters affecting, to some extent, the peace of the family may be thus brought out is not necessarily an answer to the law. So long as no confidential communication or secret is sought to be disclosed, the right of the state to punish her disobedient citizens, by the aid of such evidence, or the right of litigants to have the advantage of the same, should not be denied.

§ 296. Competency to testify — Removal of common-law disability of interest.—In many and perhaps all of the states, there are statutes providing in effect that “no person shall be disqualified as a witness in any civil action by reason of his or her interest in the event thereof, as a party or otherwise.” As the common law regarded the natural interest felt by husband or wife in the result of an action in which the other might be affected as one of the chief reasons why the evidence of wife or husband could not be introduced for or against the other, it necessarily follows that the removal of this disqualification materially affects the competency of the evidence of such persons as witnesses. And under this new state of things, a wife is competent to testify in an action concerning matters affecting the interests of her husband proximately or remotely, and whether he be a party to the action or is directly benefited or injured by the result, where the matters to be testified about are not confidential communications.² These innovating statutes generally provide, substantially, that “no husband or wife shall, by virtue of the law removing the disability of interest, be rendered competent to testify for or against each

¹ State v. Welch, 26 Me. 30, 32.

² Lincoln Ave. & N. C. Gravel Road Co. v. Madans, 102 Ill. 417; Code Ala. 1876, § 3058; Johnson v. State, 77 Ala. 920; Hussey v. State, 87 Ala. 121, 145; Woods v. State, 76 Ala. 35; Gordon v. Tweedy, 71 Ala. 202; Long v. Waters, Adm’r, 47 Ala. 624; Sumner v. Cook,

51 Ala. 521; Rowland v. Plummer, 50 Ala. 182; Chicago, K. & W. R. Co. v. Anderson, 42 Kan. 297, 21 Pac. Rep. 1059; Cosgrove v. His Creditors, 41 La. Ann. 274, 6 S. Rep. 585; Augham-paugh v. Schmidt, 77 Iowa, 13, 41 N. W. Rep. 472.

other as to any transactions occurring during the marriage; . . . provided, that no husband or wife shall be competent to testify to any admissions or conversations of the other . . . except in suits or cases between such husband and wife.”¹ The effect of statutes thus invading the common law is to entirely do away with the old rule, saving, however, the exceptions named in the statute. They can testify freely, though interested, to the extent not expressly forbidden.² And where such statutes are in force, both husband and wife may testify in an action in which they are jointly interested;³ though this will not be permitted where to do so would violate the law forbidding testimony concerning acts or statements of a decedent by a party to the suit who is directly interested.⁴

§ 297. Effect of laws removing disability of interest—Extent of incompetency to testify.—Though the local statute law may invade the common-law rule and remove the disability of interest, and even go so far in this direction as to permit a defendant to testify in his own behalf in a criminal case, the incompetency of the wife to testify for the husband remains. And her testimony is not forbidden, indeed, on the ground that she has or has not any interest in the result of the action or proceeding. It rests, rather, upon the public policy of the state, which the wisdom and experience of the ages has demonstrated to be necessary.⁵ And the law of the state regulating the admissibility of evidence respecting husband and wife in such cases controls in the federal courts sitting within such state.⁶ The rule is, unless the innovation expressed in the statute clearly or by necessary implication provides that

¹ Rev. St. Ill. 1874, § 5.

² *Muller v. Rebhand*, 94 Ill. 142; *Mitchinson v. Cross*, 58 Ill. 356; *Harriman v. Sampson*, 23 Ill. App. 159.

³ *Edmonson v. City of Moberly*, 98 Mo. 523, 11 S. W. Rep. 990.

⁴ *Jones v. Hough* (Ga.), 25 S. E. Rep. 566.

⁵ *Steen v. State*, 20 Ohio St. 333; *State v. Waterman*, 1 Nev. 543; *Wharton, Crim. Ev.*, §§ 400, 437; *Wilker v. People*, 60 Barb. 527; *Kennedy v. People*, 37 Ind. 353; *Bird v. Hous-*

ton, 10 Ohio St. 418; *United States v. Kan-Gi-Shun-Ca* (Crow Dog), 3 Dak. 106, 14 N. W. Rep. 437; *Lucas v. Brooks*, 18 Wall. 436; *Hussey v. State*, 87 Ala. 121, 6 S. Rep. 420; *Woods v. State*, 76 Ala. 35; *Johnson v. State*, 47 Ala. 9; *Stanley v. Montgomery*, 102 Ind. 102, 26 N. E. Rep. 213; *Thornton v. Goar*, 87 Va. 315, 12 S. E. Rep. 753.

⁶ 12 Stat. at L. 588; *Lucas v. Brooks*, 85 U. S. 436.

the husband or wife may testify for or against each other, the law removing the disabilities because of interest will not be extended by construction to authorize or require the testimony of the husband or wife against the other.¹ And where by statute the disability of interest is removed, a wife may testify, in an action by her against a guarantor on the bond of her husband for his good behavior, that he had been drunk in her presence. And this is true though by statute, practically reenacting the common law, a wife is forbidden to testify as to communications made to her by the husband and *vice versa*.² A widow may be required to testify to any fact coming to her knowledge during the marriage not of a confidential nature in an action against the husband's legal representatives to enforce a demand against his estate.³ This is not testifying against her husband, but only in an action by his legal representatives as to matters not confidential between husband and wife.

§ 298. Competency to testify — Proof of marriage.— In order that a proper objection may be made to the competency of a witness offered, the objecting party must show that he or she is lawfully married to the party in interest or the objection cannot be sustained. It is not necessary, however, in such cases, to prove the marriage with the precise certainty required in cases of criminal conversation and like instances; but it is sufficient, in order to establish the marriage and show the incompetency of the witness, to prove the marriage by reputation — the recognition of each other by the parties as husband and wife, and that they are so accepted by their ac-

¹ *Alcock v. Alcock*, 12 Eng. L. & Eq. 354; *Barbat v. Allen et al.*, 10 Eng. L. & Eq. 596; *Stapleton v. Craft*, 10 Eng. L. & Eq. 455; *Lincoln Ave. & N. C. Gravel Road Co. v. Medans*, 102 Ill. 417; *Mitchinson v. Cross*, 58 Ill. 366; *Kelly v. Proctor*, 41 N. H. 452; *Cram v. Cram*, 33 Vt. 15; *Manchester v. Manchester*, 24 Vt. 649; *Pillow v. Bushnell*, 5 Barb. 156; *Hasbrouck v. Vandervoort*, 5 Seld. 153; *Harrington v. City of Sedalia*, 98 Mo. 583, 12 S. W. Rep. 342; *Hopkins v. Grimshaw*, 17 Sup. Ct. Rep. 401.

² *Stanley v. Stanley*, 112 Ind. 143

13 N. E. Rep. 261; Rev. St. Ind. 1881, § 497. See also *Schmidt v. Frank*, 86 Ind. 250. In Kansas, neither the husband nor wife is permitted to testify in any case to communications made to the one by the other during the marriage, whether private or otherwise. Civil Code Kan., § 323; *Chicago, K. & N. Ry. Co. v. Ellis*, 52 Kan. 48, 34 Pac. Rep. 352.

³ *Floyd v. Miller*, 61 Ind. 224; *Perry v. Randall*, 83 Ind. 143; *Denbo v. Wright*, 53 Ind. 226; *Scroggin v. Holland*, 16 Mo. 419.

quaintances, friends, relatives and others.¹ And though the proof of marriage show that it was procured by violence and threats, it has been held that it will nevertheless suffice to render the evidence of one of the parties to it incompetent where it was solemnized in manner and form required by law.²

§ 299. Competency to testify — Statutes requiring consent. In a number of the states there are statutes which provide that a husband or wife may not be examined against the other without the consent of the one examined, but may be with it. This requires the personal consent of the witness.³ And if the other party be dead, his power to consent being at an end, the testimony cannot be admitted at all.⁴ And under such a law if the husband testify in a case against his wife without her consent and in her absence, this will be ground for reversal though the counsel for the wife was present and did not object.⁵ And the rule holds good in the case of a wife testifying against her husband without his consent where he married her after she had been served with a subpoena to testify. The competency of the witness must be determined by the status of the parties at the time the evidence is offered.⁶ It is held in Alabama under a similar statute, that the husband may be required to testify as

¹People v. Anderson, 26 Cal. 129; United States v. Bassett (Utah), 13 Pac. Rep. 237.

²Lacoste v. Guidroz, 47 La. Ann. 295, 16 S. Rep. 836. The doctrine of this case, however, would seem to be vulnerable to some criticism. A marriage by force or violence is a marriage without consent, and a contract made where the minds of the parties do not meet as to the subject-matter is not a contract, cannot be enforced, and no rights accrue thereby. Likewise, a marriage so had is not a marriage, and the simple fact that one of the parties was forced to go through the forms of law certainly does not make the transaction a marriage; though, of course, if it should be recognized by the injured party afterwards, the force would be condoned and the

marriage doubtless good in every sense. And the recognition in such a case would relate back to the time of the celebration and render the contract good *ab initio*.

³Fitzgerald v. Livermore (Cal.), 13 Pac. Rep. 167.

⁴Emmons v. Barton, 109 Cal. 662, 42 Pac. Rep. 303. To like effect see *In re Flint's Estate*, 100 Cal. 391, 34 Pac. Rep. 863.

⁵Hubbell v. Grant, 39 Mich. 641, 643; Comp. Laws Mich., § 5969. See, too, *Blanchard v. Moors*, 85 Mich. 380, 48 N. W. Rep. 542.

⁶*Pedley v. Wellesley*, 3 Car. & P. 558; 1 Greenl. Ev., § 340; *St. Louis, I. M. & S. Ry. Co. v. Harper*, 50 Ark. 167, 6 S. W. Rep. 720; *Park v. Locke*, 48 Ark. 133, 2 S. W. Rep. 696; *Shannon v. Fuller*, 20 Ga. 556; *Oliver v. Moore*, 12 Heisk. (Tenn.) 482.

to any act of his concerning the separate property of his wife.¹ But as to the parties, it is necessary, in order to have the testimony of the husband or wife excluded for incompetency, that objection be made for this reason when the witness is offered, otherwise the incompetency will be waived.²

§ 300. Competency to testify — Hearsay.— The declarations of the husband to the wife and *vice versa* cannot be admitted in evidence against the other, even where either might testify; for these are mere hearsay. Being so, they are no more admissible because told to the one or the other than when told to a third person.³ But the acts and exclamations of the wife, made in the presence of the husband at the time of the commission of a crime, may be proven, as these are legitimately part of the *res gestæ*.⁴

§ 301. Competency to testify — Removal of disability of interest — Res gestæ.— It is competent to show, in a proceeding bringing in question any transaction between husband and wife, the conversation and facts leading up to and consummating a transaction as part of the *res gestæ*. Such information does not come under the class of privileged communications between husband and wife so as to preclude same where the bar of interest no longer exists.⁵ And where by statute husband and wife are competent witnesses when jointly interested,

¹ Robinson v. Robinson, 44 Ala. 227.

² Watson v. Riskamire, 45 Iowa, 231.

³ People v. Simons, 19 Cal. 275; Rose v. Chapman, 44 Mich. 312, 6 N. W. Rep. 127; Blanchard v. Moors, 85 Mich. 380, 48 N. W. Rep. 542; Westlake v. Westlake, 34 Ohio St. 621; Gedney v. Gedney, 61 Ill. App. 511; State v. Arnold, 55 Mo. 89.

⁴ Lingreen v. Ill. Cent. R. R. Co., 61 Ill. App. 174; People v. Murphy, 45 Cal. 137. It is to be remembered that, by statute in California, "a husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage, or

afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage," and excepting, also, cases of husband and wife against each other, and criminal actions for a crime committed against the other. Codes and Statutes Cal., § 1881. *Vide*, too, Mitchel v. Golglazier, 106 Ind. 464, 7 N. E. Rep. 199; Rose v. Chapman, 44 Mich. 312, 6 N. W. Rep. 681.

⁵ Darrier v. Darrier, 58 Mo. 222; Henry v. Sneed, 99 Mo. 407, 12 S. W. Rep. 663. See also Rea v. Jaffray, 83 Iowa, 231, 48 N. W. Rep. 78; State v. Gabriel, 38 Mo. 631; Lingreen v. Ill. Cent. R. R., 61 Ill. App. 174.

the husband may testify as to issues concerning any fact tending to show such joint interest.¹

§ 302. Competency as witnesses — What are not confidential communications.—It is not every word that passes between the husband and wife that is forbidden to be shown in evidence as a communication of confidence because of the marital relation. So, such acts and deeds as are not necessarily of this nature may be proven. Upon this principle a wife may testify, in a claim by the creditors of her husband for her land, that she furnished him the money to buy the same and he improperly took title in his own name.² And again, where the husband has bought land and taken the title thereto in his wife for the purpose of defrauding his creditors, the wife may be made a witness for the creditors to show that she paid no consideration for the property.³ That the husband, in his lifetime, transferred a claim or cause of action of any kind to his wife during their joint lives, is not a confidential communication, and the widow may testify as to the fact.⁴ It is proper to permit the wife to state, as a witness in her own behalf, that she paid a *bona fide* consideration for property transferred by her husband to her in a proceeding by his creditors to subject the same to the payment of their debts.⁵ That one is drunk in the presence of his wife, unless the fact of drunkenness was confided by him to her, is not privileged.⁶ And the fact that a

¹ Darrier v. Darrier, 58 Mo. 222; Minard v. Currier, 67 Vt. 489, 32 Atl. Rep. 472. But in an action in which a decedent defends by his legal representatives, and in which case it is forbidden by statute for any one to testify unless called by such representative, a husband or wife cannot testify, where either or both are parties, unless so called by the opposite party, though but for the fact of the issue touching transactions with the decedent, the evidence would be competent. Pyle v. Pyle, 158 Ill. 289, 41 N. E. Rep. 999.

² Beitman v. Hopkins, 100 Ind. 177, 9 N. E. Rep. 720; Sedgwick v. Tucker, 90 Ind. 271; Brown v. Carey, 149 Pa. St. 134, 23 Atl. Rep. 1103; Mitchel v.

Golglazier, 106 Ind. 464, 7 N. E. Rep. 199; Appeal of Spitz, 50 N. J. L. 464, 14 Atl. Rep. 776; Jack v. Kintz, 177 Pa. St. 571, 35 Atl. Rep. 867.

³ Leonard v. Green, 30 Minn. 496, 16 N. W. Rep. 399.

⁴ Hanks v. Van Gardner, 59 Iowa, 179, 13 N. W. Rep. 103.

⁵ Henry v. Sneed, 99 Mo. 407, 12 S. W. Rep. 663; Blanchard v. Moors, 85 Mich. 380, 48 N. W. Rep. 542. To same effect, see Hunt v. Eaton, 55 Mich. 352, 21 N. W. Rep. 429. This ruling, of course, is under How. Ann. St. (Mich.), § 7546, removing the common-law disqualification of interest.

⁶ Stanley v. Stanley, 112 Ind. 143, 13 N. E. Rep. 261.

husband, by force, violence or threats, compelled his wife to do an act, is not privileged.¹ The fact that the wife is the legatee will not render the husband incompetent to testify concerning the legacy where he is not a party to the suit and no judgment can be rendered against him.² Statements made by a husband or wife to another in the presence of all may be shown in evidence in an action against such third person by the wife or the husband. Such communications are not confidential, and it is competent to show the conversation by the husband or wife, as the case may be, and the silence or statements of the third party in reference thereto; and this is true though the wife be incompetent to testify herself in the action, or that the husband be so incompetent.³ The admission of testimony to the effect that a defendant and his wife were in a room together after his arrest does no violence to the rule shielding confidential communications.⁴ And it is competent to prove, in an action by the husband for the alienation of his wife's affections by another, that his wife declined to take rides with him and went with the other instead.⁵ That a husband defiantly boasts of his intention to continue and keep up insolent and mortifying taunts and abuse or cruel conduct generally towards his wife is not a confidential communication, and may be testified to by his wife where the disqualification of interest is removed.⁶ Where the husband refuses to furnish his wife necessaries and she buys them of a tradesman, she is a competent witness against her husband in an action on such purchase.⁷

¹ *Byerline v. State* (Ind.), 45 N. E. Rep. 772.

² *Watts v. Baker*, 78 Ga. 622, 3 S. E. Rep. 773. This ruling, of course, is under a statute removing the disqualification of interest, and permitting the husband or wife to testify for each other in a civil action. Code Ga., § 3854.

³ *Byerline v. State* (Ind.), 45 N. E. Rep. 772; *Schmeid v. Frank*, 86 Ind. 250; *Jack v. Russey*, 8 Ind. 180; *Reynolds v. State* (Ind.), 46 N. E. Rep. 31; *Mainard v. Reider*, 2 Ind. App. 115, 28 N. E. Rep. 196. See *People v.*

Lewis, 62 Hun, 622, 16 N. Y. S. 881; *In re Buckman's Will*, 64 Vt. 313, 24 Atl. Rep. 252; *Brown v. Norton*, 67 Ind. 424; *Williams v. Riley*, 88 Ind. 290; *Mercer v. Patterson*, 41 Ind. 440; *Lyon v. Prouty*, 154 Mass. 488, 28 N. E. Rep. 908.

⁴ *Sage v. State*, 127 Ind. 15, 26 N. E. Rep. 667.

⁵ *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. Rep. 438.

⁶ *Seitz v. Seitz*, 170 Pa. St. 71, 32 Atl. Rep. 578.

⁷ *Reed v. Crissey*, 63 Mo. App. 184.

§ 303. Instances illustrating the rule of privilege.—Where the administrator of the deceased husband finds among the papers of the wife letters from her husband in his life-time which were detrimental to the interest of the estate in pending litigation, they cannot be read as evidence.¹ Where the common law is so changed that a wife may testify against her husband except as to confidential communications, she cannot waive the privilege herself, and her evidence as to such communications will be improper if objected to by the husband.² In a criminal trial where a woman is charged in the indictment with being the wife of the accused, she is not a competent witness on the part of the state, for the state cannot consistently charge that she is the wife and at the same time use her evidence as though she were a stranger.³ In Indiana it is held that the fact that the husband communicated to the wife a venereal disease is not a privileged communication.⁴ Under a statute forbidding the husband or wife to testify against each other in civil cases, neither can be required to testify to facts which would show a fraudulent conveyance or transaction between themselves.⁵ And under this statute the rule of immunity applies as well in suits by and against husband or wife as

¹ *Bowman v. Patrick*, 32 Fed. Rep. 386. In this case the administrator seems to have turned the letters over to the adversary side in a spirit of animosity or revenge. And it seems clear in view of this fact, if for no other reason, that the decision is right. Certainly no court would tolerate such a wanton disregard of a fiduciary obligation enjoined by law upon all occupying a trust relation.

² *People v. Wood*, 126 N. Y. 249, 27 N. E. Rep. 362. See Penal Code N. Y., § 715.

³ *State v. Ulrich*, 110 Mo. 350, 19 S. W. Rep. 656.

⁴ *Polson v. State*, 137 Ind. 519, 35 N. E. Rep. 907. The learned court in this case reasoned the point thus: "The court did not err, in our opinion, in permitting the wife of the appellant to testify that he had communicated to her a loathsome vene-

real disease, on the ground that such testimony was a breach of the confidential relations existing between husband and wife. Such conduct on his part was a gross breach of his duty as a husband, and he could not, therefore, shield himself from exposure in a court of justice, where such fact became material evidence in a cause, on the ground that it was a confidential communication."

⁵ *Greene v. Greene*, 42 Neb. 634, 60 N. W. Rep. 937; *Code Civ. Proc. Neb.*, § 332; *Niland v. Kalish*, 37 Neb. 47, 55 N. W. Rep. 295; *Blanchard v. Moors*, 85 Mich. 380, 48 N. W. Rep. 542; *Buckingham v. Roar*, 45 Neb. 244, 63 N. W. Rep. 398; *Phoenix Fire & M. Ins. Co. v. Shoemaker*, 95 Tenn. 72, 31 S. W. Rep. 270; *Newstrom v. St. Paul & D. R. Co.*, 61 Minn. 78, 63 N. W. Rep. 253; *Wolford v. Farnham*, 44 Minn. 159, 46 N. W. Rep. 295.

in cases where third parties are concerned.¹ Under such local law, though a husband object to his wife as a witness when offered against him, he may still use her as a witness in his own behalf where they may testify for each other under statute.²

In a prosecution by the state against the husband for adultery, the wife is not a competent witness to prove the marriage.³ Nor would the rule be different had the wife been divorced since the occurrence.⁴ The same is true in *quasi*-criminal actions for criminal conversation and like proceedings.⁵ But generally, any private communication from the husband to the wife, or *vice versa*, made when they are alone, is privileged.⁶

§ 304. Competency of declarations after death.—It is sometimes both necessary and proper to prove the declarations of a husband or wife after death by the other, and in some instances this is permitted. And in all instances of this kind it is patent that the effect of such testimony may concern his or her legal representatives. The declarations of the husband

¹ *Skinner v. Skinner*, 38 Neb. 756, 57 N. W. Rep. 534; *Greene v. Greene*, 42 Neb. 634, 60 N. W. Rep. 937.

² *Wolford v. Farnham*, 44 Minn. 158, 46 N. W. Rep. 295. The learned court in this case waived the question whether a witness, being thus called by the husband or wife, could then be examined generally by the adverse party. But as the statute expressly forbids the testimony of the one against the other, doubtless the privilege would extend as well after such examination as before, though, no doubt, it would be entirely proper to permit the opposite side to cross-examine such a witness under circumstances of this nature on any point brought out in the direct examination. See *Haberty v. State*, 8 Ohio Cir. Ct. Rep. 262.

³ *State v. Jolly*, 3 Dev. & B. (N. C. Law), 110; *Owen v. State*, 78 Ala. 425, 429; *People v. Imes* (Mich.), 68 N. W. Rep. 157. And of course she could not, under the familiar common-law principle that she cannot testify

against her husband, give evidence, in such a case, of the acts constituting the adultery.

⁴ *Hanselman v. Dovel*, 102 Mich. 505, 60 N. W. Rep. 978.

⁵ *Mathews v. Yerex*, 48 Mich. 361, 12 N. W. Rep. 489; *Reynolds v. Schaffer*, 91 Mich. 494, 52 N. W. Rep. 15; *Hanselman v. Dovel*, 102 Mich. 505, 60 N. W. Rep. 978.

⁶ *Owen v. State*, 78 Ala. 425; 1 Greenl. Ev., § 254; *Swoope v. State* (Ala.), 22 S. Rep. 479; *State v. Brittain*, 117 N. C. 783, 23 S. E. Rep. 433. In this last case the husband, by means of menace, threats and putting in fear, extorted from his wife an acknowledgment of an act of intercourse which was incestuous. On another occasion and in the presence of a third party, he by the same means forced the same confession, and it was properly held that the communication in either case was privileged and evidence thereof could not be required of the wife as a witness.

have been admitted to prove the pedigree of his wife, upon the principle that inscriptions upon monuments, family jewelry, etc., as well as family records of births, deaths, marriage, and like matters, are competent evidence.¹ Likewise, it is competent to prove by the wife the handwriting of the husband to a bond after his death.² And where the books of a tavern were kept by the wife, who collected all the bills and looked after the business as the agent of her husband, she was held a competent witness in an action by the administrator of the husband against a boarder for the amount of his bill.³ It has been held that the wife may testify that she employed a nurse, and thereby charge her husband or his estate with liability for the services, as such matters properly pertain to the domestic affairs of the wife.⁴

§ 305. Competency to testify for or against each other — Actions against administrators and executors.— While the local law may empower a husband or wife to testify for or against each other, yet this is never allowed to conflict with the statutory or constitutional requirement that in actions against the legal representatives of decedents certain testimony is forbidden; for instance, where no act or conversation of the decedent may be proven by a party to the action against or in favor of whom a judgment may be rendered on the pleadings, unless, of course, the law permitting the testimony of the wife or husband be paramount, as being enacted later and in express conflict with the other law, or it be a constitutional provision and the other only statutory, and like instances.⁵ This rule of law is considered necessary to protect legal representatives. When death closes the lips of one party, the law closes those

¹ *Vowles v. Young*, 13 Ves. Jr. 140, 144; *Stein v. Bowman*, 13 Pet. 209.

² *Neilius v. Brickell's Adm'r*, 1 Hayw. (N. C.) 19.

³ *Hughes' Adm'rs v. Stokes' Adm'rs*, 1 Hayw. (N. C.) 372. See also *Matlock v. Mutual Life Ins. Co.*, 5 Pa. Dist. Rep. 113.

⁴ *Anonymous*, 1 Str. 527. See, too, *Stein v. Bowman*, 13 Pet. 209.

⁵ *Crane v. Crane*, 81 Ill. 165; *Treleaven v. Dixon*, 119 Ill. 548, 9 N. E. Rep.

189; *Warwick v. Hull*, 102 Ill. 280; *Way v. Harriman*, 126 Ill. 132, 18 N. E. Rep. 206; *Shaw v. Schoonover*, 130 Ill. 448, 22 N. E. Rep. 589; *Stodder v. Hoffman*, 158 Ill. 490, 41 N. E. Rep. 1082; *Mann v. Forrein* (Ill.), 46 N. E. Rep. 1119; *Erusha v. Tomash* (Iowa), 67 N. W. Rep. 392; *Giffert v. McGuern*, 51 Ill. App. 387; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. Rep. 1056; *Wylie v. Charlton*, 43 Neb. 840, 62 N. W. Rep. 220.

of the other, in order that the living may not have an undue advantage of the dead. If the party in interest in such cases is incompetent to testify by reason of this rule, the wife or the husband, as the case may be, will also be incompetent.¹

§ 306. Competency to testify — Equity rule — Right of the wife to testify in equity concerning her separate property.— In equity there is an exception to the general rule of incompetency of the husband or wife to testify. This exception is, a wife may, in equity, testify in her own behalf as to matters affecting her separate estate as though she were a *feme sole*.² This rule, however, of course, can only be invoked in courts of chancery, not of law. It is allowed as a necessary consequence of the rule in chancery which recognizes to a large extent the separate civil existence of husband and wife, and gives to each property and other rights which could not be done except upon the principle of the dual existence of the husband and wife.

§ 307. Competency to testify — Burden of showing incompetency.— *Prima facie*, all who have arrived at mature age are capable of giving testimony in any case, civil or criminal. So, where the evidence of the husband or wife is objected to as incompetent, and the relation is denied by the other party, the *onus* is on the party objecting to prove, *prima facie* at least, that the marriage relation exists, otherwise the objection to the evidence for incompetency cannot be sustained.³ For, if there be no marriage relation, the evidence, of course, would be competent so far as privilege for this reason is concerned. And the courts never take judicial notice of any marriage. Affirmative proof of the fact, therefore, is very clearly necessary.

¹ Niehaus v. Cooper (Ind. App.), 52 N. E. Rep. 761.

² Appeal of Spitz, 50 N. J. L. 464, 14 Atl. Rep. 776.

³ Whart. Ev. (2d ed.), § 421; Commonwealth v. Mudgett, 174 Pa. St. 211, 34 Atl. Rep. 588; Cole v. Cole, 153 Ill. 585, 38 N. E. Rep. 702.

CHAPTER III.

COMMUNITY PROPERTY.

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| <p>§ 308. Definition.</p> <p>309. Acquests and gains.</p> <p>310. Effect of purchase of property in name of either partner.</p> <p>311. Investment of community funds by survivor.</p> <p>312. Property purchased by either party during marriage—Presumptions.</p> <p>313. Effect of abandonment by husband or wife.</p> <p>314. Effect of divorce.</p> <p>315. Effect of adultery in wife.</p> <p>316. Conflict of laws with respect to community property.</p> <p>317. Interest of wife in community estate.</p> <p>318. Status of wife's separate estate.</p> <p>319. Right and authority of survivor.</p> <p>320. Authority of husband over community property.</p> <p>321. Authority of husband as survivor.</p> <p>322. Liability of survivor for community debts.</p> <p>323. Investment of community funds by survivor—Effect.</p> | <p>§ 324. Administration of the community.</p> <p>325. Marriage settlement—Effect of on community estate.</p> <p>326, 327. Liability of the partners for community debts.</p> <p>328, 335. Liability of community property for individual debts.</p> <p>329. Right of subrogation to rights of community creditors.</p> <p>330. Partition of community property.</p> <p>331. Effect of death of one partner.</p> <p>332, 333. Separate estate of wife.</p> <p>334. Right of either party to sue for dissolution of the community.</p> <p>336. Rights of heirs in community estate.</p> <p>337. What is not community property.</p> <p>338. Status of community property cannot be changed by post-nuptial agreement between husband and wife.</p> |
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§ 308. **Definition.**—Community property is a species of property which the law vests in the husband and wife by virtue of the marriage relation in those states which take their laws in this respect from the Spanish, French, Mexican and Roman law. It is in the nature of partnership property, the rights of the husband and wife therein being fixed by law. There are two kinds of community property: First, conventional, which is that resulting from express agreement of the husband and wife with respect to the property coming to the community by virtue of the marital relation, and which takes the

place of the law with reference thereto, somewhat as antenuptial settlement fixes the status of the parties in jurisdictions where these laws are not in force. The second kind of community property is the legal community, and this is that status of the husband and wife with reference to their property rights which is fixed by law upon the consummation of the marriage contract, and exists regardless of any agreement with reference thereto, or rather without such agreement. "The community embraces all the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact; of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them or by purchase, or in any other similar way, even although the purchase be made in the name of the two and not of both."¹ The interests of the husband and wife are equal.² And even where property is purchased by a survivor after the death of the other it will become community property where it is thus purchased with community funds.³ And the individual property of either, when mingled by the owner with the community estate so as to make identification uncertain or impossible, becomes community property thereby.⁴ And where there has been an intermingling of individual and community property, and the individual owner claims the same as against creditors of the community, the burden is on him or her to identify the individual property, and if this is not done it will become liable for community debts and otherwise partake of the community character generally.⁵ Of course there must in all cases be a valid marriage, for without this there can be no community property nor community rights of any kind.⁶ A

¹ Bouvier's Law Dict., "Community." And see *Edwards v. Brown*, 68 Tex. 329, 5 S. W. Rep. 87; *Dickson v. Sanderson*, 72 Tex. 359, 10 S. W. Rep. 535; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. Rep. 909; *Schmidt's Civil Law of Spain and Mexico*, art. 49, ch. 4, § 1; *Crary v. Field* (N. M.), 50 Pac. Rep. 342.

² *Veramendi v. Hutchins*, 48 Tex. 531; *Eslinger v. Eslinger*, 47 Cal. 62; *Holyoke v. Jackson*, 3 Wash. 235, 3

Pac. Rep. 841; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. Rep. 380.

³ *McAlister v. Farley*, 39 Tex. 552.

⁴ *Reid v. Reid*, 112 Cal. 274, 44 Pac. Rep. 564; *Smith v. Bailey*, 66 Tex. 553, 1 S. W. Rep. 627; *Robb v. Robb* (Tex. Civ. App.), 41 S. W. Rep. 92.

⁵ *Clafin v. Pfeifer*, 76 Tex. 469, 13 S. W. Rep. 483.

⁶ *Succession of Dejan*, 40 La. Ann. 437, 4 S. Rep. 89.

marriage, therefore, where one of the parties has a living and undivorced husband or wife will not confer community rights upon the second spouse, as a general rule.¹ And in order that a marriage exist as the law requires, the parties must live together as husband and wife. If one desert the other culpably, such deserter will not be heard to claim the rights and benefits of a lawful marriage as to community property.² Yet, while this is true in a general way, it is held that if a woman should in good faith marry a man believing him to have been regularly divorced from a former wife, she will be entitled to her interest in the property acquired by the efforts of both subsequent to her marriage, though the divorce proceedings be in fact of no force.³

§ 309. Acquests and gains.—Acquests and gains, under the Louisiana code governing community property rights, and similar laws in force in other jurisdictions, are the property and effects acquired by husband and wife in a joint capacity and with reference to the community, either by intention or effect in law. It is distinguished from property to which an heir succeeds by inheritance. It comprises not only such property acquired by the husband and wife jointly or to which they come by joint right of any kind, but the increase and profits arising out of such property as well, including the fruits of the reciprocal labor of the husband and wife.⁴ This being true, it is held in Louisiana where a wife who, before marriage, was possessed of an individual estate and brought the same into the community, where it was afterwards treated as such property by her, the property being handled in the name of the husband, it thereby becomes community property, and liable for any debts for which community property is generally liable.⁵ Where the husband and wife acquire a right of action for board furnished by the family, the indebtedness will belong to the community,

¹ *Chapman v. Chapman*, 11 Tex. Civ. App. 392, 32 S. W. Rep. 564.

² *Succession of Llula*, 44 La. Ann. 61, 10 S. Rep. 406.

³ *Morgan v. Morgan*, 1 Tex. Civ. App. 315, 21 S. W. Rep. 154.

⁴ Civ. Code La., § 2369; *Bouvier's Law Dict.*, "Acquests;" *Ford v. Ford*, 1 La. (O. S.) 201; *Jacobson v. Bunker*

Hill & S. M. & C. Co., 2 Idaho, 863, 28 Pac. Rep. 396; *Neale v. Depot Ry. Co.*, 94 Cal. 425, 29 Pac. Rep. 954; *Jordan v. Fay*, 98 Cal. 264, 33 Pac. Rep. 95. And see *Adams v. Baker* (Nev.), 55 Pac. Rep. 362.

⁵ *Nehnert v. Dietrich*, 86 La. Ann. 390.

and not to either partner separately.¹ And where either partner engages in business of any kind, the presumption is, the assets as well as profits thereof are community effects.² And the profits of such business arising during the marriage will be community property, though the business is owned by one member as individual property.³ The earnings of both spouses are regarded the same way, and, until the contrary is affirmatively shown, are presumed to be community assets.⁴ The rents and profits arising from the separate realty of the wife fall into the community.⁵ Likewise does the interest on her separate and individual money.⁶ And the law always presumes that the community of acquests and gains is in force between the husband and wife, unless it be otherwise shown.⁷ On the other hand, it also presumes that liabilities contracted by the husband are a community debt; for he is the head of the community so long as he lives.⁸

§ 310. Purchase of property with community funds in name of husband and wife — Effect of — Trust.— Where the husband or wife purchases property in his or her name with funds belonging to the community, no matter by what form of deed, the transaction will result in a trust in favor of the community. The one so taking the title to the property will be decreed to hold the same in trust for the community.⁹ This construction of the law is evidently proper, and is necessary in order to prevent one member of a community from defrauding the same by improperly setting up a title or claim to property which in justice and right belongs to the community.

§ 311. Investment of community funds by survivor — Effect of.— Where the surviving husband or wife improperly

¹ Read v. Rahm, 65 Cal. 843, 4 Pac. Rep. 111.

² Oregon Imp. Co. v. Sagmeister, 4 Wash. 710, 30 Pac. Rep. 1058; Succession of Webre, 49 La. Ann. 1491, 23 S. Rep. 390.

³ Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. Rep. 705; Canfield v. Moore (Tex. Civ. App.), 41 S. W. Rep. 718.

⁴ Yake v. Pugh, 13 Wash. 78, 42 Pac. Rep. 528.

⁵ Schepflin v. Small, 4 Tex. Civ. App. 493, 23 S. W. Rep. 432.

⁶ Cobell v. Menczer (Tex. Civ. App.), 35 S. W. Rep. 206.

⁷ Van Winkle v. Violet, 30 La. Ann. 1106.

⁸ Calhoun v. Leary, 6 Wash. 17, 32 Pac. Rep. 1070.

⁹ McComb v. Spangler, 71 Cal. 418, 12 Pac. Rep. 847.

invests the funds of the community in property of any kind, the purchaser of such property will hold it in trust for the heirs of the marriage to the extent of their interest in the community.¹ So, where the husband, as survivor of a community estate, sells the community land and appropriates the proceeds of the sale to his own use, he will be liable to the children for their interest in the property or proceeds thus converted, with legal interest from the time of the conversion.² It seems that the children of a survivor of a community who improperly invests the funds thereof may elect to claim the investment in lieu of the partnership property.³ If the survivor should, without authority, sell any of the community assets to one having notice of the facts, the purchaser will acquire no greater title than the grantor had. He would take subject to the rights of the heirs as well as creditors.⁴

§ 312. Property purchased during marriage — Presumptions.— Generally speaking, the law presumes that property purchased while the marriage relation exists, by either the husband or the wife, and whether with the individual means of either or with the community fund, is intended as community property. And this character will be impressed upon it by law from these facts in the absence of any showing to the contrary.⁵ And the same presumption seems to obtain in the case

¹ *Worst v. Sgitcovich* (Tex. Civ. App.), 46 S. W. Rep. 72.

² *Aikin v. Jefferson*, 65 Tex. 137; *Linskie v. Kerr* (Tex. Civ. App.), 84 S. W. Rep. 765; *Richardson v. Overleese* (Tex. Civ. App.), 44 S. W. Rep. 308.

³ *Worst v. Sgitcovich* (Tex. Civ. App.), 46 S. W. Rep. 72.

⁴ *Gurley v. Dickason* (Tex. Civ. App.), 46 S. W. Rep. 53.

⁵ Civ. Code La., § 2371; *Murphy's Heirs v. Jury*, 39 La. Ann. 785, 2 S. Rep. 575; *Durruty v. Musacchia*, 42 La. Ann. 357, 7 S. Rep. 555; *Caffey's Ex'rs v. Cooksey* (Tex. Civ. App.), 47 S. W. Rep. 65; *Succession of Rhodes*, 39 La. Ann. 473, 2 S. Rep. 36; *Gogreve v. Dehon*, 41 La. Ann. 244, 6 S. Rep. 81; *Succession of Rogge* (La.), 23 S.

Rep. 933; *Stauffer v. Morgan*, 39 La. Ann. 633, 2 S. Rep. 98; *Presidio Min. Co. v. Bullis*, 68 Tex. 581, 4 S. W. Rep. 860; *Kempner v. Comer*, 73 Tex. 196, 11 S. W. Rep. 194; *Hawley v. Geer* (Tex.), 17 S. W. Rep. 914; *Jordan v. Anderson*, 29 La. Ann. 749, 751; *Durham v. Williams*, 32 La. Ann. 162; *Bachino v. Coste*, 35 La. Ann. 570; *Ford v. Ford*, 1 La. (O. S.) 201; *Davidson v. Stuart*, 10 La. (O. S.) 146; *Dominguez v. Lee*, 17 La. (O. S.) 295; *Berte v. Walker*, 1 Rob. (La.) 431; *Provost v. Delahoussaye*, 5 La. Ann. 610; *Webb v. Peet*, 7 La. Ann. 92; *Tally v. Heffner*, 29 La. Ann. 583; *Bennett v. Fuller*, 29 La. Ann. 663; *Cox v. Miller*, 54 Tex. 16; *Schmeltz v. Garey*, 49 Tex. 49; *Zorn v. Tarver*, 45 Tex. 519; *Stanley v. Epperson*, 45

of any property whatever when a question arises as to its community character after the marriage.¹ The fact that one of the parties purchases the property in his or her name does not raise a presumption that it was his or her individual property, nor does it rebut the presumption that it belongs to the community.² Nor does a mutual acknowledgment between husband and wife that any part of their property is the individual effects of the wife, and bought with her funds, establish this fact as to creditors.³ Debts contracted by the husband during the life of the wife are presumed to be community debts though contracted in the name of the husband alone, as he is the head and front of the community.⁴ But where the survivor purchases property in his own name, it will be deemed individual property, the presumption to the contrary arising only in cases where both parties are alive, and where the community has not been dissolved by death or divorce.⁵ This presumption, however, is only one of fact, and may always be overcome by proof of facts inconsistent therewith, as where the property is purchased with paraphernal funds of the wife or the separate property of the husband, instead of funds properly belonging to the community.⁶ But the mere recital in a deed to one of the parties that the consideration was his or her separate prop-

Tex. 645; *Wedel v. Herman*, 59 Cal. 507; *Pancoast v. Pancoast*, 57 Cal. 320; *Byars v. Byars*, 11 Tex. Civ. App. 565, 32 S. W. Rep. 925; *Abbott v. Wetherby*, 6 Wash. 512, 33 Pac. Rep. 1070; *Lake v. Lake*, 18 Nev. 361, 4 Pac. Rep. 711; *Morgan v. Lones*, 78 Cal. 58, 20 Pac. Rep. 248; *Tolman v. Smith*, 85 Cal. 280, 24 Pac. Rep. 743; *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. Rep. 398; *Hill v. Young*, 7 Wash. 33, 34 Pac. Rep. 144; *In re Boody's Estate*, 113 Cal. 682, 45 Pac. Rep. 858; *Woodland Lumber Co. v. Link*, 16 Wash. 72, 47 Pac. Rep. 222; *Duncan v. Bickford*, 83 Tex. 322, 18 S. W. Rep. 598; *Hanover Fire Ins. Co. v. Shrader*, 11 Tex. Civ. App. 255, 31 S. W. Rep. 1100; *Lewis v. Burns* (Cal.), 55 Pac. Rep. 132; *Maxson v. Jennings* (Tex. Civ. App.), 48 S. W. Rep. 781.

¹ *Schuler v. Savings & Loan Soc.*, 64 Cal. 397, 1 Pac. Rep. 479.

² *Smalley v. Lawrence*, 9 Rob. (La.) 210; *Gwynn v. Dierssen* (Cal.), 36 Pac. Rep. 103.

³ *Black v. Mellville*, 10 La. Ann. 784. And see *Forbes v. Forbes*, 11 La. Ann. 326; *Shaw v. Hill*, 20 La. Ann. 531.

⁴ *Moniotte v. Lieux*, 41 La. Ann. 528, 6 S. Rep. 817; *Bierer v. Blurock*, 9 Wash. 63, 36 Pac. Rep. 975; *McDonough v. Craig*, 10 Wash. 239, 38 Pac. Rep. 1034; *Bryant v. Stetson & P. M. Co.*, 13 Wash. 692, 43 Pac. Rep. 931.

⁵ *Golding v. Golding*, 43 La. Ann. 555, 9 S. Rep. 638.

⁶ *Miller v. Handy*, 33 La. Ann. 160; *Succession of Lewis*, 45 La. Ann. 833, 12 S. Rep. 952; *Stauffer v. Morgan*, 39 La. Ann. 632, 2 S. Rep. 98; *Rouyer v. Carroll*, 47 La. Ann. 768, 17 S. Rep. 292; *Succession of Rogge*, 50 La. Ann.

erty is not sufficient to overcome the presumption.¹ The *onus probandi* is generally upon the party claiming that the property is not community, but individual or paraphernal effects.² But where the instrument through which the partner receives title expresses the same to be the separate property of the grantee, the *onus* is on the party denying this to sustain his contention.³ Where one party becomes a creditor of the community, he or she is postponed to the rights of general creditors of the partnership who are strangers to such transaction; but the right of the husband or wife to realize a claim of this kind out of the community is paramount to the rights of the other partner or his or her heirs.⁴

§ 313. Abandonment — Effect on community rights.—The law does not permit one party to culpably renounce the marriage relation and, at the same time, enjoy the rights and privileges incident to the marriage thus renounced. The courts very properly hold, therefore, that where the husband or wife culpably leaves and abandons the other, the party thus improperly abandoned becomes entitled to the same rights in the community as would be the case in the event of the death of the other.⁵ Where the husband, therefore, culpably and permanently abandons his wife, she thereby becomes authorized to sell and dispose of the community assets; for she thereby becomes practically the survivor of the partnership.⁶ And, of course, she can do so without joining her husband in the sale or conveyance.⁷ And she may sue alone to recover any community property, wrongfully converted or withheld by a stranger as

—, 23 S. Rep. 933; *Bachino v. Coste*, 35 La. Ann. 570; *Hanna v. Pritchard*, 6 La. Ann. 730; *Neher v. Armijo* (N. M.), 54 Pac. Rep. 236; *Rogge v. Nouvet* (La.), 23 S. Rep. 933; *Brookman v. State Ins. Co.*, 18 Wash. 308, 51 Pac. Rep. 395; *Weymouth v. Sawtelle*, 14 Wash. 32, 44 Pac. Rep. 109.

¹ *Bartles v. Souchon*, 48 La. Ann. 783, 19 S. Rep. 941.

² *Succession of Lyons*, 50 La. Ann. 50, 23 S. Rep. 117; *Nixon v. Wichita Land & C. Co.*, 84 Tex. 408, 19 S. W. Rep. 560; *Stauffer v. Morgan*, 39 La. Ann. 638, 2 S. Rep. 98; *Burns v.*

Thompson, 39 La. Ann. 377, 1 S. Rep. 913; *Shaw v. Hill*, 20 La. Ann. 531; *Pope v. Foster*, 24 La. Ann. 521; *Davis v. Green* (Cal.), 55 Pac. Rep. 9.

³ *Evans v. Purinton*, 12 Tex. Civ. App. 158, 34 S. W. Rep. 350.

⁴ *Succession of Merrick*, 35 La. Ann. 296.

⁵ *Cullers v. James*, 66 Tex. 494, 1 S. W. Rep. 314.

⁶ *Woodson v. Massenburg*, 3 Tex. Civ. App. 146, 22 S. W. Rep. 106.

⁷ *Leeds v. Reed* (Tex. Civ. App.), 36 S. W. Rep. 347.

effectively as could her husband have done had he not abandoned her.¹

§ 314. Divorce — Rights of parties.— A divorce from the bonds of matrimony puts an end to the marital relation, and after such a decree regularly made neither party to a marriage can enforce any property right against the other which grows out of the marital relation.² The effect of a dissolution of the marriage by a tribunal of competent jurisdiction is practically the same as the death of one of the parties. It is a civil death so far as the marriage is concerned.³ But the rights of a wife in divorce proceedings as to the community property proper are generally regarded as inferior to the rights of creditors of the community. Her right to alimony will not be permitted to prejudice their *bona fide* claims against the community assets.⁴ In those states where the law of community property is in force, there is usually a mode provided by statute where the community is dissolved and wound up according to the rights of the respective parties upon the rendition of a decree of divorce, after which event the parties become strangers to each other with reference to all property rights, as well as in general.⁵ And the presumption when the community is thus dissolved is, property found in the possession of either spouse at the time of the decree of divorce belongs to the community.⁶ If the court in granting the divorce should fail to make any order fixing the property rights of the parties, they will become thereafter tenants in common, for the dissolution of the marriage by law ends the community character of the property rights.⁷

§ 315. Adultery of wife — Effect as to property rights.— Under the Spanish laws relating to community property rights, adultery in the wife works a forfeiture of her interest. The

¹ Leeds v. Reed (Tex. Civ. App.), 36 S. W. Rep. 347.

² Barnett v. Barnett (N. M.), 50 Pac. Rep. 337.

³ McCaffrey v. Benson, 40 La. Ann. 10, 3 S. Rep. 393.

⁴ Ghent v. Boyd (Tex. Civ. App.), 43 S. W. Rep. 891.

⁵ Van Brunt v. Van Brunt, 52 Kan. 380, 34 Pac. Rep. 1117; Johnston v. Johnston, 54 Kan. 726, 39 Pac. Rep.

725. And see Raper v. Raper, 58 Kan. 590, 50 Pac. Rep. 502; Bruner v. Bruner (Tex. Civ. App.), 43 S. W. Rep. 796.

⁶ McCelvy v. Cryer (Tex. Civ. App.), 37 S. W. Rep. 175.

⁷ Southwestern Mfg. Co. v. Swan (Tex. Civ. App.), 43 S. W. Rep. 813; Kirkwood v. Domnan, 80 Tex. 647, 16 S. W. Rep. 428.

wife can claim no property right by reason of the marital relation when during coverture she has been guilty of adultery.¹ Anciently, the crime of treason worked a forfeiture of this property right also.² This ruling is upon the general principle that neither husband nor wife will be permitted to enjoy any rights, benefits or privileges of the married relation when they conduct themselves in a manner utterly inconsistent with, and repugnant to, the duties, obligations and responsibilities of this important relation.

§ 316. **Conflict of laws.**—In a sense the laws of those states where the rule of community property is in force have no extra-territorial effect; that is, the rights, privileges and liabilities incident to the law of this species of property are for those only who marry within the state where the law is in force, or come into it after marriage in good faith, for the purpose of taking up their abode and yielding fealty to its laws. If the marriage takes place in another state, and the parties never live in the state where the law of community property is recognized, the property rights of the parties must be governed by the laws of the state of their domicile, though they may have property in the state where the rule of community is in force.³ It is held in Texas, however, that the rights of the parties, so far as realty situated within that state is concerned, will be governed by the rule of community property in force in that state, though their residence and domicile are in a state where such laws are not recognized.⁴ It is held in Louisiana that where parties are married in France, by the laws of which country there is no community of acquests and gains, and thereafter move to Louisiana, where such laws are effective, with the *bona fide* intention of taking up their abode there, the laws of that state will then govern their rights of property within its bounds.⁵ And this ruling is no doubt correct. The fact that the rule governing community property rights grants these privileges to the citizens of one state and denies the same to citizens of

¹ Barnett v. Barnett (N. M.), 50 Pac. Rep. 337, 339.

² Barnett v. Barnett (N. M.), 50 Pac. Rep. 337, 339.

³ Conner v. Elliott, 18 How. (U. S.) 591.

⁴ Heidenheimer v. Loring (Tex. Civ. App.), 26 S. W. Rep. 99.

⁵ Tourné v. Tourné, 9 La. (O. S.) 452; Pritchard v. Citizens' Bank, 8 La. (O. S.) 130.

other states does not violate the federal constitution.¹ There is in such cases no real discrimination. Any citizen of any other state may enjoy the rights and privileges of the law of community property by doing those things which are required of all others in order to enjoy this privilege. If non-residents wish to acquire these privileges they must in good faith become citizens of the state where the law of community property is in force.

§ 317. Interest of wife.—The interest of the wife in community property is somewhat like the dower interest in lands of the husband at common law. Should the husband survive the wife, nothing will be hers, as she has no vested and fixed interest in the estate during the existence of the marriage. And if she should survive her husband, she will then succeed to one-half of the community estate, subject only to the rights of creditors to collect their claims.² One partner of the community, therefore, cannot bequeath all the community effects so as to prejudice the right of the survivor to his or her half.³ But the wife may bequeath her interest in the community subject to the rights of community creditors.⁴ Her bequest would become effective at her death, where her husband has died first; but if she should execute a will bequeathing her interest in the community estate in the life-time of her husband, and he should survive her, such testamentary disposition of the interest of the wife in the community would be of no effect, for upon the death of the wife the whole of the community estate vests in the husband, and there is nothing to pass by the bequest.

§ 318. Wife's separate estate.—Generally speaking, any property which the wife has at the time of her marriage in her own right, or which she may afterwards acquire with her individual resources separate and distinct from the community, such as by inheritance, etc., will be her separate personal estate.⁵ Property conveyed by the husband to the wife during marriage, though community estate, therefore becomes the sep-

¹ Conner v. Elliott, 18 How. (U. S.) 591.

² Succession of Boyer, 36 La. Ann. 506; Hair v. Wood, 58 Tex. 77; Cook v. Norman, 50 Cal. 633.

³ In re Givins' Estate, 77 Cal. 813, 19 Pac. Rep. 527.

⁴ Engleman v. Deal (Tex. Civ. App.), 37 S. W. Rep. 652.

⁵ Flourney v. Flourney, 86 Cal. 283,

arate property of the wife upon such conveyance, where there is no fraudulent purpose in the transfer, and the rights of creditors are not thereby prejudiced.¹ But this rule does not obtain in the case of a conveyance by the husband to his second wife, where he at the time had a prior living wife undivorced, and this was known to the second wife.² The separate property of either the husband or wife is presumed to continue the same after the marriage as before. And when this character of the property is established, it overcomes the presumption that all the property in the possession of husband or wife is community estate.³ The record of a deed executed to a wife after her marriage is notice of its contents. And if it be such in its purport as to put strangers upon notice or inquiry that the consideration thereof was her separate property, this, too, will serve to overcome the presumption that all after-acquired property is community estate.⁴ And the general rule where separate property of either party has been so changed or transformed by the owner or with his consent as to practically or completely lose its original nature or character is, it requires clear and convincing proof to sustain the claim that it is individual effects.⁵ In such cases there is an adverse presumption to overcome, and a mere preponderance of evidence is never sufficient to overcome a presumption of law.

§ 319. Rights of survivor.— Upon the death of the husband or wife the property of the community “vests, in the absence of adverse ante-nuptial stipulations, in the living spouse and in the heirs of the deceased, in the proportion of one-half in the former and a like share in the latter, collectively or jointly.”⁶

24 Pac. Rep. 1012; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. Rep. 869; *Freeburger v. Gazzam* (Wash.), 32 Pac. Rep. 732. And see *McGlauffin v. Merriam*, 7 Wash. 111, 34 Pac. Rep. 561.

¹ *Hunter v. Hunter* (Tex. Civ. App.), 45 S. W. Rep. 820; *Lewis v. Simon*, 72 Tex. 470, 10 S. W. Rep. 554; *Schepflin v. Small*, 4 Tex. Civ. App. 493, 23 S. W. Rep. 432.

² *Kimble v. Kimble* (Wash.), 49 Pac. Rep. 216.

³ *In re Bauer's Estate*, 79 Cal. 304, 21 Pac. Rep. 759. And see *Morgan v. Lones*, 80 Cal. 317, 22 Pac. Rep. 253.

⁴ *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. Rep. 695. See, too, *Yester v. Hochstettler*, 4 Wash. 349, 30 Pac. Rep. 398.

⁵ *Dimmick v. Dimmick*, 95 Cal. 323, 30 Pac. Rep. 547.

⁶ *Dickson v. Dickson*, 36 La. Ann. 453, 455.

These rights of the survivor attach at once upon the death of the other and become fixed by operation of law.¹ Upon the death of the wife, the husband, as survivor, may sell the land of the community to pay the community debts without first exhausting the personalty for such purpose.² And it has been held that the wife may do the same where there is no administration on the community estate.³ In fact, the authority and control of the community estate is invested in the wife upon the death of the husband, and, so long as she remains unmarried, she may control, sell and manage it just the same as the husband can when he survives.⁴ But the widow can assert no authority nor dominion over the community after she again marries.⁵ They would be subject, first, to the payment of the legal claims of creditors. She would own one-half of the same as the surviving spouse of the first marriage, but would have no authority to dispose of any of the community property as such after her second marriage.

§ 320. Authority of husband over community.—In Louisiana and other states the husband is the head and manager of the community effects so long as he lives and the marriage remains intact. He is vested with the power and authority to dispose of any property of the community as he may see fit, subject, of course, to the right of the wife to proceed against his heirs to assert her interest therein when the disposition is a fraud upon her property rights in the community estate.⁶ He therefore is the proper party against whom to bring an action to ascertain any rights or liabilities concerning the community, and it is not necessary to join the wife.⁷ Nor is it necessary

¹ *Tugwell v. Tugwell*, 32 La. Ann. 848.

² *Wenar v. Stenzel*, 48 Tex. 484.

³ *Ladd v. Farrar* (Tex.), 17 S. W. Rep. 55.

⁴ *Withrow v. Adams*, 4 Tex. Civ. App. 438, 23 S. W. Rep. 437.

⁵ *Llano Improvement & F. Co. v. Cross*, 5 Tex. Civ. App. 175, 24 S. W. Rep. 77.

⁶ La. Civ. Code, § 2404; *Succession of Boyer*, 36 La. Ann. 506, 511; Civ. Code Cal., § 679; *Spreckles v. Spreckles*, 116

Cal. 339, 48 Pac. Rep. 228; *Moore v. Moore*, 73 Tex. 383, 11 S. W. Rep. 396; *Tourné v. Tourné*, 9 La. (O. S.) 452; *Tourné v. His Creditors*, 6 La. (O. S.) 459; *McDaniel v. Harley* (Tex. Civ. App.), 42 S. W. Rep. 323. And see *Law v. Spence* (Idaho), 48 Pac. Rep. 282; *Hardin v. Sparks*, 70 Tex. 465, 7 S. W. Rep. 769.

⁷ *Central Coal & Coke Co. v. Henry* (Tex. Civ. App.), 47 S. W. Rep. 281; *Spreckles v. Spreckles*, 116 Cal. 339, 48 Pac. Rep. 228; *Bohm v. Bentler*

to join the heirs after the death of the wife.¹ Not only is he the head of the community during the marriage, but he has, in Louisiana, the absolute ownership of half the community upon the death of the wife, in addition, a life-time usufruct of the other half.² And this life usufruct given the survivor where there are children of the marriage is not defeated by the execution of a will by the other partner.³ But if the bequest be absolutely inconsistent with the usufruct the latter must yield.⁴ And this usufruct is liable for the debts of the husband, for it becomes his property.⁵ But the husband cannot sell, in a general way, any interest in the community assets except the half which the law vests in him upon the death of his wife.⁶ And if he deserts his wife, and neglects to provide for her and her children, he loses the authority to control the community; and this power and authority is then transferred to the wife by operation of law.⁷ Nor can the husband dispose of or sell any of the community property with the purpose of defeating the rights of the wife; for could he do this, the right of the wife to enjoy the community property would be at the mercy or caprice of the husband.⁸ And in Washington the husband is forbidden to alien or incumber the property of the community unless the wife joins in the contract.⁹ This being true, the husband, after the death of the wife, could only convey his interest in the community, and could not defeat the right of the heirs of the wife to succeed to her half of the partnership estate, subject to the community debts, of course, by any contract or conveyance he might make.¹⁰ But it is held

(Tex. Civ. App.), 41 S. W. Rep. 658; *Moseley v. Henry*, 66 Cal. 478, 6 Pac. Rep. 134; *Spirlock v. Port Townsend South R. R. Co.*, 13 Wash. 29, 42 Pac. Rep. 520.

¹ *Gulf, W. T. & P. R. R. Co. v. Goldman*, 8 Tex. Civ. App. 257, 28 S. W. Rep. 267. And see *Travis Co. v. Trogdon* (Tex. Civ. App.), 29 S. W. Rep. 405; *Gulf, W. & T. P. Ry. Co. v. Goldman*, 87 Tex. 562, 29 S. W. Rep. 1062.

² *Succession of Webre*, 49 La. Ann. 1491, 22 S. Rep. 390; *Succession of Planchet*, 29 La. Ann. 520.

³ *Succession of Moore*, 40 La. Ann. 531, 4 S. Rep. 460.

⁴ *Succession of Moore*, 40 La. Ann. 531, 4 S. Rep. 460.

⁵ *Heirs of Gee v. Thompson*, 41 La. Ann. 348, 6 S. Rep. 548.

⁶ *Johnson v. Harrison*, 48 Tex. 257; *Veramendi v. Hutchins*, 48 Tex. 531; *Bennett v. Fuller*, 29 La. Ann. 663. And see, apparently *contra*, *Williams v. Fuller*, 27 La. Ann. 635.

⁷ *Zimpleman v. Robb*, 53 Tex. 274.

⁸ *Lord v. Hough*, 43 Cal. 581.

⁹ *Hoover v. Chambers*, 3 Wash. 26, 13 Pac. Rep. 547.

¹⁰ *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. Rep. 172.

here, nevertheless, that he may make a general assignment of all the community property for the purpose of paying community debts without his wife joining in the assignment or assenting thereto.¹ And he may make contracts alone for the improvement of the community estate and thereby incumber it with a mechanic's lien for the payment of the price of the improvements, and upon a regular foreclosure and sale under and by virtue of such lien the purchaser will take title free from any claims of the wife.² He may mortgage the community property to pay the partnership debts without the concurrence or even sanction of his wife;³ and, without her consent, dedicate it to the public for highway purposes.⁴ But he cannot appropriate the individual property of his wife to the payment of his individual or a community debt without her authority.⁵

§ 321. Authority of surviving husband to dispose of community property.—The surviving husband occupies a relation to the community effects similar to that of a surviving partner to the firm property. This authority includes the right to sell, for a fair and reasonable value, all or any of the property of the community that is necessary to pay the debts thereof. This authority is paramount to the rights of children or others who would succeed to the community in whole or in part by reason of the law of inheritance.⁶ If the survivor should sell community property and misappropriate the proceeds, he would be liable to the parties in interest for his misconduct; but the purchaser, if he acted in good faith, would take a good title.⁷ He may also execute a valid mortgage on

¹ Thygesen v. Neufelder, 9 Wash. 455, 37 Pac. Rep. 672.

² Douthitt v. McCulsky, 11 Wash. 601, 40 Pac. Rep. 186.

³ McKinney v. Nunn, 82 Tex. 44, 17 S. W. Rep. 516.

⁴ Orrick v. Ft. Worth (Tex. Civ. App.), 32 S. W. Rep. 443.

⁵ Bunker v. Hathrup (Wash.), 55 Pac. Rep. 122.

⁶ Crary v. Field (N. M.), 50 Pac. Rep. 342; Davis' Heirs v. Elkins, 9 La. (O. S.) 135; Hill v. Osborne, 60

Tex. 390; Veramendi v. Hutchins, 56 Tex. 414; Cook v. Norman, 50 Cal. 633; Good v. Coombs, 28 Tex. 35; Von Rosenberg v. Perrault (Idaho), 51 Pac. Rep. 774; McDaniel v. Harley (Tex. Civ. App.), 42 S. W. Rep. 323; White v. Waco Bldg. Ass'n (Tex. Civ. App.), 31 S. W. Rep. 58; Nelms v. Nagle (Tex. Civ. App.), 35 S. W. Rep. 60; Mangum v. White (Tex. Civ. App.), 41 S. W. Rep. 80.

⁷ Crary v. Field (N. M.), 50 Pac. Rep. 342.

it to pay community debts.¹ And the wife may mortgage her part upon the death of the husband.² But neither survivor can mortgage any part of the community property except to pay community debts.³ And where the surviving wife marries, her authority and control over the community property at once ceases.⁴ The survivor of the conjugal partnership may incumber or sell his or her share of the partnership when the effect of the transaction does not prejudice creditors of the community.⁵ And where the survivor of a community partnership sells community assets when it is necessary to do so to pay community liabilities, the purchaser is not required to see that the money so realized is properly appropriated; but he has a right to presume that it will be.⁶ The survivor may sell the property of the community to pay the partnership obligations when necessary, though the property thus sold may consist of or include the homestead.⁷ This he may do though there be other community property which he might sell.⁸ And this authority to so sell exists though the husband and wife have infant children at the time, and the community is insolvent.⁹ Further, when a sale is thus made by the survivor, the presumption is it was proper and necessary to pay community debts, and the burden of showing the contrary is on those so claiming.¹⁰

§ 322. Liability of survivor for community debts.—In Louisiana, the husband, when he becomes the survivor of the community by the death of the wife, is liable personally and individually for all the debts of the community. His separate property may be seized and sold by such creditors for the purpose of realizing their demands.¹¹ As to the wife, however, she

¹ *Billgery v. Billgery*, 34 La. Ann. 387; *Jordan v. Imthurn*, 51 Tex. 276.

² *Hickman v. Thompson*, 24 La. Ann. 264.

³ *Cestac v. Florane*, 31 La. Ann. 493.

⁴ *Puckett v. Johnson*, 45 Tex. 551; *Hasseldenz v. Dofflemyre* (Tex. Civ. App.), 45 S. W. Rep. 830; *Auerbach v. Wylie*, 84 Tex. 619, 19 S. W. Rep. 856.

⁵ *Good v. Coombs*, 28 Tex. 35.

⁶ *Cage v. Tucker's Heirs* (Tex. Civ. App.), 37 S. W. Rep. 180; *Eastham v. Sims*, 11 Tex. Civ. App. 133, 32 S. W. Rep. 359.

⁷ *Watts v. Miller*, 76 Tex. 13, 13 S. W. Rep. 16; *Tustin v. Adams*, 87 Fed. Rep. 377.

⁸ *Burkitt v. Key* (Tex. Civ. App.), 42 S. W. Rep. 231.

⁹ *Fagan v. McWhirter*, 71 Tex. 567, 9 S. W. Rep. 677.

¹⁰ *Von Rosenberg v. Perrault* (Idaho), 51 Pac. Rep. 774.

¹¹ *Lawson v. Ripley*, 17 La. Ann. 238; *Hawley v. Bank*, 26 La. Ann. 230; *Landreaux v. Loque*, 43 La. Ann. 234, 9 S. Rep. 32; *Gay v. Herbert*, 44 La. Ann. 301, 10 S. Rep. 775.

may relieve herself of any liability for the community debts upon the death of her husband by renouncing the community;¹ and her heirs may do likewise.² In Texas the surviving wife is not individually bound for the community debts as is the husband.³ Where a husband is survivor of a community and marries again, paying the debts of the first community for which he is bound out of funds belonging to the second community, he will become liable to the second for the amounts thus misappropriated.⁴

§ 323. Investment of community funds by survivor — Effect.— Where the surviving husband or wife improperly invests the funds of the community in property of any kind, the property thus bought will be held in trust for the heirs of the deceased partner to the extent of such interest.⁵ So, where the husband, as survivor of a community, sells the community land and appropriates the proceeds of the sale to his own use, he will be liable to the children for their interest in the property or proceeds thus converted, with legal interest from the time of the conversion.⁶ It seems that the children of a survivor of a community who improperly invest the funds thereof may elect to claim the investment of the partnership property in lieu of the community interest.⁷ If the survivor should, without authority, sell any of the community assets to one having notice of the facts, the purchaser will acquire no greater title than the grantor had. He would take subject to the rights of the heirs as well as creditors.⁸ In other words, would become a trustee to this extent, and chargeable accordingly.

§ 324. Administration.— It is usually provided by statute, with more or less modification, that the surviving member of a community succeeds to the administration of the partnership.

¹Landreaux v. Loque, 43 La. Ann. 234, 9 S. Rep. 32.

²Landreaux v. Loque, 43 La. Ann. 234, 9 S. Rep. 32.

³Leatherwood v. Arnold, 66 Tex. 414, 1 S. W. Rep. 173.

⁴Succession of Schwenck, 43 La. Ann. 1110, 10 S. Rep. 185.

⁵Worts v. Sgitcovich (Tex. Civ. App.), 46 S. W. Rep. 72.

⁶Aikin v. Jefferson, 65 Tex. 137; Linskie v. Kerr (Tex. Civ. App.), 34

S. W. Rep. 765; Richardson v. Overleese (Tex. Civ. App.), 44 S. W. Rep. 308.

⁷Worts v. Sgitcovich (Tex. Civ. App.), 46 S. W. Rep. 72.

⁸Gurley v. Dickason (Tex. Civ. App.), 46 S. W. Rep. 54.

holding the same in trust for the payment of partnership debts.¹ But the survivor has no right to administer unless the marriage was legal.² In Louisiana the administrator of the husband's succession is liable, in a trust capacity, for the debts of the community contracted while he was the head and manager of the community to the extent of the estate which is thus held.³ In Texas the surviving husband or wife may give bond and take charge of all the community assets, and the same will then be held in trust for the creditors of the community.⁴ But neither could make any valid transfer of the community property to the prejudice of creditors or others having valid claims without first giving bond and carrying out the provisions of the law in such cases.⁵ In other words, the administration of the succession of the deceased husband involves, necessarily, the administration of the community itself.⁶ And a sale of the community assets, regularly made by the administrator for the purpose of paying the partnership indebtedness, cuts off all rights of the heirs thereto.⁷ It is different, however, with regard to the succession of the wife; for she stands in a different attitude with reference to the community property, having no interest therein until the community debts are paid. An administration upon her individual estate, therefore, does not involve an administration of the community, as in the case of an administration of the succession of the husband.⁸ In cases where an administration becomes necessary it should be upon the whole of the community, and not merely upon that of the interest of one of

¹ See *Stephenson v. Marsallis*, 11 Tex. Civ. App. 162, 33 S. W. Rep. 383; *In re Hill's Estate*, 6 Wash. 285, 33 Pac. Rep. 585; *In re Burdick's Estate*, 112 Cal. 387, 44 Pac. Rep. 734; *Succession of Applegate*, 39 La. Ann. 400, 2 S. Rep. 42; *Caire v. Her Creditors*, 45 La. Ann. 461, 12 S. Rep. 624; *Reddick v. White*, 46 La. Ann. 1198, 15 S. Rep. 487; *Pressler v. Wilkie*, 84 Tex. 344, 19 S. W. Rep. 436; *Williams v. Howard*, 10 Tex. Civ. App. 527, 31 S. W. Rep. 835; *Oppenheimer v. De Lopez* (Tex. Civ. App.), 81 S. W. Rep. 826.

² *Chapman v. Chapman*, 11 Tex. Civ. App. 392, 32 S. W. Rep. 564.

³ *Succession of Fernandez* (La.), 23 S. Rep. 457.

⁴ *Leatherwood v. Arnold*, 66 Tex. 414, 1 S. W. Rep. 173.

⁵ *Nix v. Mayer* (Tex.), 2 S. W. Rep. 819.

⁶ *Succession of McLean*, 12 La. Ann. 224; *Durham v. Williams*, 82 La. Ann. 962; *Succession of Lamm*, 40 La. Ann. 312, 4 S. Rep. 58; *Berthelot v. Fitch*, 45 La. Ann. 391, 12 S. Rep. 625.

⁷ *Halbert v. Carroll* (Tex. Civ. App.), 25 S. W. Rep. 1102.

⁸ *Succession of Fernandez* (La.), 23 S. Rep. 457.

the partners.¹ And an administrator of the succession of a deceased wife has no authority over the community assets, and can neither sell nor appropriate the same to the payment of either community or individual debts.² The administrator of the wife has no right of control over the community assets, though her husband may have culpably deserted her.³ And where a creditor of the community reduces his claim to judgment in an action against the survivor of the partnership, and community property is regularly sold thereunder, the sale will preclude all rights of heirs and vest good title in the purchaser.⁴

§ 325. Marriage settlement — Effect.— Where the husband and wife before marriage enter into a marriage contract whereby the interest of each in the community to be formed by the marriage is to be governed by the amount of property each brings into the community, such an arrangement will supersede the usual community rights, and will control.⁵ And this being true, creditors and heirs will only inherit and have a right to resort to the interest of the survivor according to the rights thus fixed.⁶ So, parties contemplating marriage may stipulate that either shall bring certain separate property into the community, to be thereafter enjoyed as partnership effects.⁷ But when the community property rights of the parties become fixed by law upon the consummation of the marriage, no post-nuptial agreement between them can change the status thus effected by law.⁸

§ 326. Liable for partnership debts.— The community estate, being regarded in law as a species of partnership, is always held liable for the valid debts of creditors of the community upon a principle analogous to that which fixes a liability on all the property of an ordinary partnership for firm debts.⁹

¹ In re Hill's Estate, 6 Wash. 285, 33 Pac. Rep. 585.

² Verrier v. Lorio, 48 La. Ann. 717, 19 S. Rep. 677.

³ Cullers v. May, 81 Tex. 110, 16 S. W. Rep. 813.

⁴ White v. Waco Bldg. Ass'n (Tex. Civ. App.), 31 S. W. Rep. 58.

⁵ Succession of Coco, 32 La. Ann.

325; Barrow v. Stephens, 27 La. Ann. 343.

⁶ Succession of Coco, 32 La. Ann. 325.

⁷ Hanley v. Drumm, 31 La. Ann. 106.

⁸ Cox v. Miller, 54 Tex. 16.

⁹ Culmore v. Medlenka (Tex. Civ. App.), 44 S. W. Rep. 676; Curry v. Catlin, 9 Wash. 495, 37 Pac. Rep. 678.

This being true, when a creditor sells any property of the community under a judgment against the husband as the head of the community, this will divest the interest of the wife in the thing sold, just the same as it precludes the right of the husband.¹ The community property is liable for a judgment for costs in a successful action by a claimant to fasten a liability upon the community where the claim is resisted by the partnership.² It is also liable upon an indemnity bond executed by the husband alone in a *bona fide* action to enforce a community obligation.³ Also for damages caused by a wrongful attachment sued out to recover a community debt.⁴ It has been held in Washington, under the statutes of that state giving the husband control of the community personalty, "with a like power of disposition as he has of his separate personal property," that the community personal property is subject to seizure and sale to pay the debt of an individual creditor of the husband.⁵ And later it was held in this state that an individual creditor of the husband who has secured a lien by execution and levy upon the community personalty acquired a paramount right as to such personalty over a community creditor;⁶ though it seems that community realty is not liable for the personal debts of either partner to the prejudice of creditors of the community.⁷

§ 327. Liability of husband and wife for community debts. The husband and wife are liable in equal proportions for the losses and obligations of the community. Neither is liable for more than the other, and both must bear the burden, to the extent of his or her interest in the community, of extinguishing the same.⁸ And either partner may in good faith become a

¹ *Culmore v. Medlenka* (Tex. Civ. App.), 44 S. W. Rep. 676. Pac. Rep. 878; *Gund v. Parke*, 15 Wash. 393, 46 Pac. Rep. 408. And

² *Diamond v. Turner*, 11 Wash. 189, 39 Pac. Rep. 379. see *Lee v. Henderson*, 75 Tex. 190, 12 S. W. Rep. 981; *Claffin v. Pfeifer*, 76

³ *Barnett v. O'Loughlin*, 14 Wash. 259, 44 Pac. Rep. 267; *Horton v.* Tex. 469, 13 S. W. Rep. 483.

Donohoe-Kelly Banking Co., 15 Wash. 399, 46 Pac. Rep. 409. And see *Mc-* ⁶ *Morse v. Estabrook* (Wash.), 52 Pac. Rep. 531.

Kee v. Whitworth, 15 Wash. 536, 46 Pac. Rep. 1045. ⁷ *Brotton v. Langert*, 1 Wash. 73, 23 Pac. Rep. 688; *Gund v. Parke*, 15 Wash. 393, 46 Pac. Rep. 408.

⁴ *Barnett v. O'Loughlin*, 14 Wash. 259, 44 Pac. Rep. 267. ⁸ *Schmidt's Civil Law of Spain and Mexico*, art. 49, ch. 4, § 1; *Crary v.*

⁵ *Powell v. Pugh*, 13 Wash. 577, 43 *Field* (N. M.), 50 Pac. Rep. 342.

creditor of the community by lending funds or advancing individual means to be repaid; and when a liability of the community to one of the members is thus established, such a debt will be entitled to protection from the community estate as are other partnership debts.¹ But as a rule, clear and satisfactory proof is required to establish an obligation of a community to one of the partners where the rights of creditors are at stake.² And, generally speaking, in actions to enforce a community liability, it is necessary to join the wife as a defendant with the husband.³ But in California it is held that property of the community, so far as the realty is concerned, is not only liable for the community debts proper, but for the debts of the husband, in general, as well.⁴

§ 328. Liability of, for individual debts.—The community property of the husband and wife is not liable for the individual debts of either beyond the interest of the debtor in the community.⁵ Where a creditor of an individual member of a community wishes to realize his debt, the remedy is to compel a final settlement and liquidation of the community in the manner pointed out by law. He cannot resort to the individual interest of his debtor in the community estate regardless of the rights of creditors of the community or of community rights in general.⁶ The community property is not liable on a contract of suretyship executed by the husband without the sanction or concurrence of the wife, and this is true in jurisdictions where it is presumed that all contracts entered into by the husband are community obligations.⁷ Any indebtedness incurred by one partner, after the death of the other, is not chargeable to the community, unless the person so seeking to charge it show that it was actually and properly used by such

¹Schmidt v. Huppman, 73 Tex. 112, 11 S. W. Rep. 175; Denégre v. Denégre, 30 La. Ann. 275.

²Denégre v. Denégre, 30 La. Ann. 275.

³Douthitt v. McCulsky, 11 Wash. 601, 40 Pac. Rep. 186. This ruling, however, is under statutes requiring both husband and wife to concur in any transactions affecting the community. And see the later case of

Spirlock v. Port Townsend South. R. Co., 13 Wash. 29, 42 Pac. Rep. 520.

⁴Schuyler v. Broughton, 70 Cal. 282, 11 Pac. Rep. 719.

⁵Shuey v. Holmes (Wash.), 54 Pac. Rep. 540; In re Cannon's Estate, 18 Wash. 101, 50 Pac. Rep. 1021.

⁶Pyor v. Giddens (La.), 23 S. Rep. 337.

⁷Spinning v. Allen, 10 Wash. 570, 39 Pac. Rep. 151.

partner in the business of the community.¹ A creditor of an individual member of a community, while he cannot resort to the community assets to realize his debt, may have the affairs of the community wound up and settled after a dissolution thereof by the death of either party, or a divorce dissolving the marriage, and may reach any part thereof to which his individual debtor may become entitled after the liquidation of the community liabilities.²

§ 329. Payment of community debt by one of the partners — Right of subrogation.— Where one of the members of a community pays a community debt individually, he or she will have an equity against the community estate for reimbursement. In such cases an equitable claim accrues to the party thus paying the debts of the community estate which may in equity be enforced against the community assets by reason and virtue of the principle of subrogation.³ The party thus advancing his or her individual funds, however, would have no other or greater right against the community than would the creditor whose claim is thus paid.

§ 330. Partition — Effect of.— If the husband and wife should own with another an undivided interest in lands as community estate, upon a partition thereof they will still be owners, as husband and wife and community partners, of the part allotted to them in partition, and would thereafter have no interest in the other.⁴ The decree of partition in no sense changes the character of the community property. That allotted takes the same character upon partition that the undivided part had before.⁵ It is simply a legal and binding designation of that part of the property to which the husband and wife are entitled and which constitutes their community estate. The interest they have is community assets, and the fact that the other owner may have the right to a legal division, as the husband and wife, by virtue of their community interest, in fact, have,

¹ *Ruthenberg v. Helberg*, 43 La. Ann. 410, 9 S. Rep. 99.

² *Rawlings v. Giddens*, 46 La. Ann. 1136, 15 S. Rep. 501.

³ *Newman v. Cooper* (La.), 23 S. Rep. 116.

⁴ *Cunha v. Hughes* (Cal.), 54 Pac. Rep. 535.

⁵ *Cunha v. Hughes* (Cal.), 54 Pac. Rep. 535.

does not change the character of their ownership. Nor could such an interest of the husband and wife operate to deprive another joint owner of the right to seek an equitable division in partition proceedings.

§ 331. Death of husband or wife — Rights of creditors.— When the husband or wife dies, this puts an end to the community, as there can be no community estate, strictly speaking, except between husband and wife. When one dies, the community will be broken up so far as a continuance of this status is concerned, yet it will necessarily be continued, in a sense by operation of law, for the purpose of liquidation and winding up, as creditors have a right to realize their partnership claims against the community effects, notwithstanding the death of either member of the community.¹ This community character of the property, therefore, continues by a kind of fictitious existence after the death of either spouse until all the creditors of the community are paid, after which the heirs become entitled to their interest.² But the community property is liable as a whole only for the community debts proper; it is not liable for the individual debts of either partner except to the extent of his or her half thereof. As to the other half, the right of the heirs is paramount.³

§ 332. Wife's separate estate — Conversion by husband — Remedy.— The separate or paraphernal property of the wife cannot be appropriated by the husband for his own use, nor by him mingled with the community assets or converted to community or his individual purposes, without her consent. And if the husband, disregarding this right of the wife, should divert her paraphernal estate into community property, or appropriate it to his own use, the wife would have her right of action against his estate, including his interest in the community, to recover the value of the property thus wrongfully converted.⁴ Of course the husband has a like right when

¹ *Ealer v. Lodge*, 36 La. Ann. 115; *Sharp v. Loupe* (Cal.), 52 Pac. Rep. 134.

³ *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. Rep. 358.

² *Succession of Dumester*, 42 La. Ann. 411, 7 S. Rep. 624; *Newman v. Cooper*, 46 La. Ann. 1485, 16 S. Rep. 481.

⁴ *Gasquet v. Dimitry*, 9 La. 585, 588; *Richardson v. Hutchins*, 68 Tex. 813, 3 S. W. Rep. 276; *Maguire v. Maguire*, 40 La. Ann. 579, 4 S. Rep. 492.

his individual funds have been diverted or converted by the wife against his consent, or without his knowledge, or otherwise improperly.¹ Where the husband purchases land in the name of the wife under his administration and management of the community, the property thus acquired will become community effects.² In any event she could not assert her right to the paraphernal funds thus invested and, at the same time, claim the fruits of the purchase.³ In order to charge the community with a liability to the wife or husband, as the case may be, on account of the individual funds belonging to either having been invested in community assets, it is necessary that the party so claiming make out his case by clear and satisfactory evidence.⁴ And it follows, of course, that the separate or paraphernal property of the wife is not liable for the debts of the community.⁵

§ 333. Debts of wife — Liability of paraphernal property. The paraphernal property of the wife is similar to the separate estate of a married woman under modern statutes. With reference to this property she may firmly bind herself by contract if her husband consents. Then this property will become liable for such individual indebtedness and may be resorted to by the creditors of the wife for the purpose of satisfying their claims.⁶ The property which accrues to a wife as heir to a succession becomes her paraphernal estate, and she may control and dispose of it as she may other paraphernal property.⁷ A gift to the wife before marriage, whether by her husband or a stranger, vests in her the property granted as paraphernal estate.⁸ But no property which is acquired by the wife during the existence of the marriage can be considered as her separate estate, except such as comes to her by gift or inheritance.⁹

¹ Succession of Foreman, 38 La. Ann. 700.

² Burns v. Thompson, 39 La. Ann. 377, 1 S. Rep. 913.

³ Burns v. Thompson, 39 La. Ann. 377, 1 S. Rep. 913.

⁴ Succession of Breaux, 38 La. Ann. 728.

⁵ Goodfellow v. Le May, 15 Wash. 684, 47 Pac. Rep. 25.

⁶ Jordan v. Anderson, 29 La. Ann. 749; Dominguez v. Lee, 17 La. (O. S.) 295.

⁷ Meegan v. Boyle, 19 How. (U. S.) 130.

⁸ Stauffer v. Morgan, 39 La. Ann. 633, 2 S. Rep. 98.

⁹ Ezell v. Dodson, 60 Tex. 331.

§ 334. **Right to sue for dissolution.**—Somewhat after the nature of the right of one partner to sue for a dissolution and winding up of the affairs of a partnership in certain cases, one of the parties to a community may, in Louisiana at least, sue for a dissolution of the community and winding up and liquidation of its affairs and liabilities.¹ But when one partner thus seeks to dissolve the community, he or she must assume the burden of showing such facts as will warrant a dissolution; and, as a general rule, nothing short of a showing that the individual property rights of the party complaining, either present or prospective, will be materially hampered or injured by reason of the mismanagement or disordered condition of the community estate will suffice for this purpose.² And where the wife succeeds in dissolving a community estate, the law presumes, in the absence of a showing to the contrary, that she has renounced the community, and it then regards her as a third person in relation thereto.³

§ 335. **Not liable for individual debts.**—As a rule the community property cannot be resorted to by an individual creditor of either the husband or wife. Out of this the community creditors must be first paid; and even then a creditor could only reach the interest of his debtor in the partnership estate, the moiety of the other partner not being available.⁴ In Washington the community personalty is liable for the personal debts of the husband by statute, but this does not include the realty. The wife, therefore, may resist a claim of an individual creditor of the husband against the community estate, though the burden is on her of showing that the debt sought to be realized by a creditor of the husband is an individual, not a community, debt.⁵ And elsewhere the moiety of an individual member of a community may be resorted to by a creditor of one of the parties, and none will be heard to complain except creditors of the community, whose right to resort to the community property to realize their community debts cannot in

¹ Bransford v. Bransford, 46 La. Ann. 1214, 15 S. Rep. 678.

² Bransford v. Bransford, 46 La. Ann. 1214, 15 S. Rep. 678.

³ Spencer v. Scott, 46 La. Ann. 1209, 15 S. Rep. 706; Heffner v. Parker, 47 La. Ann. 656, 17 S. Rep. 207.

⁴ Bollinger v. Manning, 79 Cal. 9, 21 Pac. Rep. 375.

⁵ Andrews v. Andrews, 3 Wash. 286, 14 Pac. Rep. 68; Zeigler v. His Creditors, 49 La. Ann. 144, 21 S. Rep. 666.

any way be defeated by a creditor of only a single member of the community.¹

§ 336. Right of heirs.—When the husband or wife dies, his or her heirs become entitled to an equal part of his or her share of the community assets. If both should die, the combined heirs of both would inherit the whole estate, the rights of heirs in the community, however, being always subject to the rights of creditors.² This right vests in the heirs, by operation of law, immediately upon the death of the ancestor, and no act on their part is necessary as a condition precedent to their right to succeed to such interest.³ And the property which a husband or wife receives as heir to a succession inures to his or her own benefit, and does not go into the community unless so appropriated by the person succeeding to the same.⁴ And the heirs of the wife cannot set up any title to the usufruct of the community during the life of the husband, for this is his by law regardless of the heirs.⁵ The rights of the heirs cannot be defeated by a sale of the community property by the survivor, except for the purpose of paying community debts. And if the survivor should make a sale of such property to the prejudice of the heirs, they will have their right of action against him according to their interests.⁶ And they succeed to a debt owing to their ancestor by the community.⁷ If the heirs should improperly appropriate the community effects to their own use, they would become liable to the creditors to the extent of their debts, not exceeding, however, the value of the

¹ *Webre v. Lorio*, 42 La. Ann. 178, 7 S. Rep. 460.

² *Crocker v. Crocker* (Tex. Civ. App.), 46 S. W. Rep. 870; *Ealer v. Lodge*, 36 La. Ann. 115; *Dickson v. Dickson*, 36 La. Ann. 453; *Warburton v. White* (Wash.), 52 Pac. Rep. 233; *Johnson v. Harrison*, 48 Tex. 257; *Broad v. Murray*, 44 Cal. 228; *Glasscock v. Clark*, 33 La. Ann. 584; *Landreaux v. Loque*, 43 La. Ann. 234, 9 S. Rep. 32; *Succession of Blancand*, 48 La. Ann. 578, 19 S. Rep. 683; *Crary v. Field* (N. M.), 50 Pac. Rep. 342.

³ *Tugwell v. Tugwell*, 32 La. Ann. 848; *Glasscock v. Clark*, 33 La. Ann.

584; *Tiemann v. Robson*, 52 Tex. 411; *Succession of Dumestre*, 42 La. Ann.

411, 7 S. Rep. 624; *Bartoli v. Huguenard*, 39 La. Ann. 411, 2 S. Rep. 196.

⁴ *Vasseur v. Mouton*, 34 La. Ann. 1044; *Succession of Clark*, 27 La. Ann. 269.

⁵ *Succession of Planchet*, 29 La. Ann. 520.

⁶ *Le Blue v. North American L. & T. Co.*, 46 La. Ann. 1465, 16 S. Rep. 501. And see also *Abes v. Levy*, 48 La. Ann. 40, 18 S. Rep. 896.

⁷ *Zeigler v. His Creditors*, 49 La. Ann. 144, 21 S. Rep. 666.

property appropriated.¹ The heirs cannot be defeated in this right by any act of the parents, except a disposition of the community property to pay partnership debts.² Nor, of course, could their rights be defeated by an act of a stranger to the community.³ In Texas the surviving spouse succeeds to one-half of the community property, and the surviving children of the deceased member to the other half; and it is held under this statute that a surviving child will inherit the full half of the community estate, to the exclusion of grandchildren whose parents are dead.⁴

§ 337. What is not.—According to the law of community property in those states where the laws governing these property rights are in force and are taken from the law of Spain, all the individual property of both the husband and wife which they had before marriage retains its separate and individual character after marriage the same as before.⁵ Such separate property is not liable for the community debts.⁶ And the head of the community may borrow, for community purposes, the separate funds of the other, and may execute a binding mortgage on the community property to secure the payment of the same.⁷ Not only may a husband thus borrow of the separate estate of the wife for community purposes, but he may himself become a creditor of the community where he uses his individual means for the benefit thereof in good faith and without any intention of constituting the same community assets.⁸ Money paid by the government as a pension is not community property, though paid after the marriage.⁹ And in determining whether property is individual or community estate the law looks to the origin of the right of property, rather than the final and com-

¹ *Heirs of Gee v. Thompson*, 41 La. Ann. 348, 6 S. Rep. 548.

² *McClure v. Bryant* (Tex. Civ. App.), 44 S. W. Rep. 3; *Newman v. Cooper*, 46 La. Ann. 1485, 16 S. Rep. 481; *Moody v. Smoot*, 78 Tex. 119, 14 S. W. Rep. 285.

³ *McCord v. Holloman* (Tex. Civ. App.), 46 S. W. Rep. 114.

⁴ *Pegues v. Haden*, 76 Tex. 94, 13 S. W. Rep. 171.

⁵ *Welder v. Lambert* (Tex.), 44 S. W. Rep. 281; *Imhoff v. Imhoff*, 45 La. Ann. 706, 13 S. Rep. 90.

⁶ *Sweet v. Dillon*, 13 Wash. 521, 43 Pac. Rep. 637.

⁷ *Dillon v. Dillon*, 13 Wash. 594, 43 Pac. Rep. 894.

⁸ *Heirs of Gee v. Thompson*, 41 La. Ann. 348, 6 S. Rep. 548.

⁹ *Johnson v. Johnson* (Tex. Civ. App.), 23 S. W. Rep. 1022.

plete acquisition of the same.¹ So, where separate property is owned by a member of the partnership as an individual estate at the time of the marriage, the fact that it may increase or accumulate by good management and care after the marriage will not make either the original property or the increase thereof community estate.² And, on the other hand, where the origin of the right takes place as a community transaction, the fact that the property is finally acquired by one of the members in pursuance of this initial arrangement will not constitute the property thus acquired individual property, though acquired after the death of one of the community partners.³

§ 338. Agreements between husband and wife concerning — Validity.— The law fixing the status of property of the husband and wife upon their marriage cannot be defeated by a post-nuptial agreement of the parties, whether such agreement provide what interest either shall or shall not have and enjoy in the property of the other or not. And any contract by which such a purpose is sought to be effected is void and of no force.⁴ Were the parties allowed to thus fix their property rights after marriage and thereby change the status thereof, this would be permitting them to supplant and supersede the law at their own caprice or option.

¹ *Welder v. Lambert* (Tex.), 44 S. W. Rep. 281, 284; *In re Boody's Estate*, 119 Cal. 402, 51 Pac. Rep. 634.

² *In re Higgins' Estate*, 65 Cal. 407, 4 Pac. Rep. 389; *Lake v. Lake*, 18 Nev. 361, 4 Pac. Rep. 711; *Stringfellow v. Sorrells*, 82 Tex. 277, 18 S. W. Rep. 689. The contrary is held, however, in Arizona. *Woffenden v. Charaleau* (Ariz.), 8 Pac. Rep. 302.

³ *Mills v. Brown*, 69 Tex. 244, 6 S. W. Rep. 612. And see *Harris v. Harris*, 71 Cal. 314, 12 Pac. Rep. 274.

⁴ *Cannon v. Boutwell*, 53 Tex. 626; *Green v. Ferguson*, 62 Tex. 529; *Protzell v. Schroeder*, 83 Tex. 684, 19 S. W. Rep. 292; *Engleman v. Deal* (Tex. Civ. App.), 37 S. W. Rep. 652.

CHAPTER IV.

CURTESY.

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§ 339. **Definition.**—This is a life estate held of the husband in the lands of his wife after her death, and is a creature of law rather than contract; that is, it arises by operation of law by virtue of the marriage contract. The estate is defined by Mr. Black as follows: "The estate to which by common law a man is entitled on the death of his wife, in the lands or tenements of which she was seized in possession in fee-simple or in tail during their coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate. It is a freehold estate for the term of his natural life."¹ "Tenant by the curtesy in England is where a man marries a woman seized of an estate of inheritance; that is, of lands and tenements in fee-simple or fee-tail, and has by her

¹ Black's Law Dict., "Curtesy;" Winkler v. Winkler's Ex'rs, 18 W. Va. 455; 2 Bl. Comm. 126.

issue born alive, which was capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for his life as tenant by the curtesy of England.”¹ The estate being a part and parcel of the common law is in force in all the American states where the common law has been adopted and there have been no statutory changes affecting curtesy.² It is said the estate has no moral foundation, and therefore from early times in England has been “properly styled a tenancy by the curtesy of England, that is, an estate by the favor of the law of England.”³ The estate by curtesy which the husband takes in the lands of his wife upon her death “is a freehold estate which will exist after the death of the wife for the life-time of the husband.”⁴ Once vested initiate by the marriage, seisin and issue, the wife could do no act to destroy or impair the contingent right of the husband to enjoy her lands for life, in the event he should survive her.⁵ This is true, necessarily, because one person cannot convey an estate belonging to another, just as the husband cannot ordinarily, under statutes in force at the present time, convey or defeat the inchoate right of his wife to dower in the event of her survivorship.

§ 340. Requisites.—In order that an estate by the curtesy vest perfectly in the husband, it is essential that there be, first, a lawful marriage; second, seisin in the wife at some time during the coverture; third, issue born alive capable of inheriting; fourth, the estate must be not inferior to an estate in fee simple or fee tail; fifth, there must be death of the wife and survivorship of the husband. One of the reasons for vesting the estate by curtesy in the husband at common law is, he is the natural guardian of the children by him of his deceased wife, and is bound to support and maintain them. It was therefore thought proper that he have the use and profits of the land to which the children succeeded under the law as heirs of their mother, whereby the husband might be assisted in maintaining them. The estate was given in a sense, and partly in return, as it

¹ 2 Bl. Comm. 126; Carrington v. Richardson, 79 Ala. 101.

² Carrington v. Richardson, 79 Ala. 101.

³ Banks v. Sutton, 2 P. Wms. 700, 703.

⁴ Day v. Cochran, 24 Miss. 261-274; McNeer v. McNeer, 142 Ill. 388, 32 N. E. Rep. 681.

⁵ Stewart v. Ross, 50 Miss. 776; Morris v. Edmonds, 43 Ark. 427.

were, for the support and care which the husband was required to bestow upon the children out of his own resources.¹ The wife had to be seized of a freehold estate. A mere expectancy, reversionary interest, estate in remainder, or other contingent estate is not sufficient unless the contingency upon which the right hinges takes place during the coverture, whereby the title becomes perfected in the wife.²

§ 341. Requisites — Birth of issue.— One of the cardinal requisites to the estate by the curtesy is issue of the husband and wife. The issue must be born alive and be capable of inheriting. It is not sufficient that the *fœtus* may have been alive at some time *in ventre sa mere*. If, therefore, a child is still-born there is no estate by the curtesy, for this reason.³ Even if born alive, so far as the right to transmit inheritance or confer the estate by curtesy is concerned, it is nevertheless considered in law as born dead where its life cannot possibly be of long duration, as where prematurely born so early it cannot live long in the course of nature.⁴ The issue must be legitimate, else it would be incapable of inheriting, for a bastard is *nullius filius*, and inherits from no one. But bastard issue will be sufficient to ripen the estate by curtesy where its parents marry, by which act the child becomes legitimate by operation of law, and capable of inheriting as effectively as one begotten, as well as born, in lawful wedlock.⁵ In Kentucky it is provided by statute that the

¹ 2 BL Comm. 126, 127; Carpenter v. Garrett, 75 Va. 129; Co. Litt. 30a; 4 Kent, Comm. 29; Ferguson v. Tweedy, 56 Barb. 168; Hunter v. Whitworth, 9 Ala. 965, 966; Jackson v. Johnson, 5 Cowen, 74; Stewart v. Rose, 50 Miss. 776; Winkler v. Winkler's Ex'r, 18 W. Va. 455; McDaniel v. Grace, 15 Ark. 465; McNeer v. McNeer, 142 Ill. 388, 32 N. E. Rep. 681; Cole v. Van Riper, 44 Ill. 58; Bozarth v. Largent, 128 Ill. 95, 21 N. E. Rep. 218; Tiedeman, Real Property, § 101; Malone v. McLaurin, 40 Miss. 161.

² Ferguson v. Tweedy, 56 Barb. 168; Todd v. Oviatt, 58 Conn. 174, 20 Atl. Rep. 440.

³ Marsellis v. Thalhimer, 2 Paige,

35; Rice v. Hoffman, 35 Md. 344; Grimbball v. Patton, 70 Ala. 626; Nicrosi v. Phillippi, 90 Ala. 299, 8 S. Rep. 561.

⁴ Marsellis v. Thalhimer, 2 Paige, 35. An interesting question as to this particular point might arise at the present day by reason of the fact that the progress and improvements made in the science of medicine has made it possible to develop a prematurely-born *fœtus* by means of incubators, whereby life is materially prolonged and probably assured in some cases as effectively as in cases of normal development before birth.

⁵ Hunter v. Whitworth, 9 Ala. 965.

husband's right to curtesy initiate becomes perfect upon the birth of issue alive. Under this law it is held that a child which, when born, makes a motion of its limbs, breathes, and makes a murmuring noise, is born alive within the meaning of the statute, though it dies before the umbilical cord is cut.¹ "A child when delivered," say the court, "is either alive or dead for all purposes, and to make its legal existence date from the time a physician may, in his wisdom, see proper to cut the naval cord, is without reason, and contrary to the plain meaning and intent of our statute."²

§ 342. Requisites — Seisin.— The seisin of the lands in the wife, required by law as one of the requisites of the estate by curtesy, must be an actual possession of and dominion over the realty. It must be more than a right to possess. It is required that the right of possession and the actual seisin concur.³ The husband is entitled to curtesy in the lands of his wife which descend to her by inheritance in fee-simple or fee-tail, and this is true, though when the lands descended to her they were leased for a term of years and the wife died without having ousted the tenants; their possession being deemed her possession sufficiently to establish the right of curtesy.⁴ A tenancy in fee-tail is always held sufficient to entitle the husband to curtesy.⁵ One who owns the equitable title, though the mere legal title is held by another in trust for her, has such an estate and seisin as will entitle the husband to curtesy.⁶ And while the seisin of the wife must be actual in a sense, yet this requirement is satisfied where there is a continuing right of immediate actual possession in the wife, and there is no hostile claim or adverse user.⁷ The old rule under the ancient English law re-

¹ *Goff v. Anderson*, 91 Ky. 303, 15 S. W. Rep. 866.

² *Goff v. Anderson*, 91 Ky. 303, 15 S. W. Rep. 866.

³ 2 Bl. Comm. 127; *Carpenter v. Garrett*, 75 Va. 129; *Fulton v. Johnson*, 24 W. Va. 95.

⁴ *Degrey v. Richardson*, 3 Atk. 469.

⁵ *Cunningham v. Moody*, 1 Ves. Sr. 174.

⁶ *Rawlings v. Adams*, 7 Md. 26; *Nightengale v. Hidden*, 7 R. I. 115;

Tillinghast v. Cogeshall, 7 R. I. 383, 394; *Ball v. Ball* (R. I.), 40 Atl. Rep. 234; *Ogden v. Ogden*, 60 Ark. 70, 28 S. W. Rep. 796.

⁷ *Carpenter v. Garrett*, 75 Va. 129; 4 Kent, Comm. 29, 30; *Ferguson v. Tweedy*, 56 Barb. 168; *Jackson v. Johnson*, 5 Cowen, 74; *Comer v. Chamberlain*, 6 Allen (Mass.), 166; *Seim v. O'Grady*, 42 W. Va. 77, 24 S. E. Rep. 904; *Mettler v. Miller*, 129 Ill. 640, 22 N. E. Rep. 529; *Chew v. Commission-*

quired actual seisin of the wife; a constructive seisin was not sufficient.¹ But while the wife may have the full ownership and title to land coupled with the right of possession, the husband will nevertheless have no curtesy therein where the same is actually held by another under an adverse claim during the full period of coverture.² While seisin and issue born alive are both necessary to the existence of the estate by the curtesy, yet it is not required that both exist at the same time. The seisin may take place before or after the birth of issue, or after the child is born and dies. The concurrence of time is immaterial.³ The right of curtesy is perfect, though the wife has not actual possession, where the possession is in another who holds for or in unity with her right.⁴ Where the wife succeeds to land as heir or otherwise by virtue of a will or the law of descent, the estate by curtesy does not attach until she gets possession of the property.⁵ But the possession need not be personal. If it is by a trustee, guardian or other person holding and claiming in right of the wife, this will be amply sufficient.⁶ And in the case of wild or uncultivated lands, actual seisin is not necessary where there is no adverse possession and the right to immediate actual possession is perfect.⁷ But there must be a seisin, actual or constructive, at some time during the coverture. Possession either before the coverture begins, or after it ceases, is not sufficient.⁸

§ 343. Death of wife necessary.—The death of the wife during coverture and during the life of the husband is another important requisite of the estate by the curtesy. Until then, though all the other conditions precedent exist, there is no per-

ers, 5 Rawle (Pa.), 160; *Buchanan v. Duncan*, 40 Pa. St. 82; *Appeal of Rankin* (Pa.), 16 Atl. Rep. 82.

¹ 4 Kent, Comm. 29; *Ferguson v. Tweedy*, 56 Barb. 168; *Day v. Cochran*, 24 Miss. 261.

² *McDaniel v. Grace*, 15 Ark. 465; *Brown v. Watkins*, 98 Tenn. 554, 40 S. W. Rep. 480; *Baker v. Oakwood*, 49 Hun, 416, 3 N. Y. S. 570.

³ *Jackson v. Johnson*, 5 Cowen, 74; *Hunter v. Whitworth*, 1 Ala. 965, 967.

⁴ *Sweeny v. Montgomery*, 85 Ky. 55, 2 S. W. Rep. 562; *Cushing v. Blake*,

30 N. J. Eq. 689; *De Grey v. Richardson*, 3 Atk. 469; *Jackson v. Beekman*, 8 Johns. 262, 271.

⁵ *Carr v. Anderson*, 6 App. Div. 6, 39 N. Y. S. 746.

⁶ *Yankey v. Sweeney*, 85 Ky. 64, 2 S. W. Rep. 559; *Ellis v. Dittey*, 94 Ky. 620, 23 S. W. Rep. 366.

⁷ *Davis v. Mason*, 1 Pet. 503.

⁸ *Mercer v. Selden*, 1 How. (U. S.) 37; *Bogy v. Roberts*, 48 Ark. 17, 2 S. W. Rep. 186; *Malone v. McLaurin*, 40 Miss. 161.

fectured estate in the husband. All other requirements existing, however, the death of the wife perfects the initiate estate into an absolute and vested estate by curtesy.¹ If the estate in the wife should terminate before her death by operation of law, the husband could have no curtesy.² This is true because the husband, by reason of his right to curtesy in the lands of his wife, could not take, upon her death, a title superior to that which she had. His interest arises out of hers, and when hers becomes extinguished by operation of law before her death, there is nothing thereafter for the husband to succeed to.

§ 344. **Estate-tail.**—The right of curtesy is an incident to limited as well as absolute estates. An estate-tail in the wife vests the right of curtesy in the husband. So, where land is devised or conveyed to a wife and her heirs, but conditioned that she leave heirs of her body, and to be ineffective in the event she should die without leaving children or descendants, in which event the land was to go to others, it was held that the husband had an estate by curtesy in such lands where the wife dies having had children capable of inheriting, but leaving none living, whereby the estate vested in her terminated.³ This is the now generally accepted rule in cases of this kind, though formerly it was denied.⁴ But the rule does not apply where land is conveyed or bequeathed to certain persons, and it is provided in the conveyance that it may, in the discretion of named trustees, or others in whom the authority to sell is lodged, be sold, and in pursuance of such authority the sale is actually made before the death of the wife.⁵ And the same is true where the wife has only a reversionary interest and dies before the termination of the preceding estate; for in such a case she is not seized of the realty within the meaning of the law which requires seisin in the wife.⁶ No act of the parties

¹ *Wheeler v. Hotchkiss*, 10 Conn. 65, 71; *Webb v. Trustees*, 90 Ky. 117, 225; 2 Bl. Comm. 126; Co. Litt. 30a; 13 S. W. Rep. 362; *Martin v. Renaker* (Ky.), 9 S. W. Rep. 419; *Hatfield v.*

² *Chew v. Commissioners*, 5 Rawle Sneden, 54 N. Y. 285.
(Pa.), 159.

³ *Holden v. Wells*, 18 R. I. 802, 31 Property, § 104.

⁴ *Kent, Comm. 33; Tiedeman, Real*
Atl. Rep. 265; Buckworth v. Thirkell,
3 Bos. & P. 652; *Barker v. Barker*, 2 88 N. E. Rep. 108.

⁵ *Harvey v. Brisbin*, 143 N. Y. 151.
⁶ *Martin v. Trail* (Mo.), 43 S. W. Rep. 655.

Thornton v. Krepps, 37 Pa. St. 391;
Northcut v. Whipp, 12 B. Mon. (Ky.)

can, of itself, create the estate by the curtesy; and the question of intention does not control. The estate takes its existence by operation of law whenever the wife becomes seized of an estate of the requisite kind, and the other incidents of the estate exist.¹

§ 345. **Trust estates.**—While a husband cannot have an estate by the curtesy in lands held by his wife as trustee,² yet where the lands are held by another in trust for the wife, the right of the husband to his curtesy is the same as though the wife held the legal as well as the equitable estate in her own right, instead of holding the equitable estate, only, as *cestui que trust*.³ So, where a sum of money is devised to trustees to be used in purchasing land for a daughter for life and at her death to go to her children, the husband of such daughter, all other requisites existing, will be entitled to curtesy in lands thus bought, and if the money has not been so invested at the death of the wife he will have the same interest in the money he would have had in the land.⁴ This curtesy in such money is the interest on it for the natural life of the husband, for he is entitled to whatever the land itself would earn, and therefore, being entitled to the same right to the money, he is entitled to what it would earn during his life-time.⁵ Though the wife mortgage her lands before marriage, the husband, nevertheless, will have his curtesy therein, as she is still seized of a freehold estate notwithstanding the mortgage.⁶ But the trust estate must be such that the husband by virtue of his marital relation is entitled to, or capable of, an equitable seisin;⁷ though the husband is entitled to curtesy in the equitable inheritance of his wife even when, by the terms of the bequest,

¹ *Hatfield v. Sneden*, 54 N. Y. 280, 18 Atl. Rep. 1017; *Dubs v. Dubs*, 31 Pa. St. 149; *Ball v. Ball* (R. I.), 40

² *Norton v. McDevit* (N. C.), 30 S. Atl. Rep. 234.
E. Rep. 24.

³ *Watts v. Ball*, 1 P. Wms. 108; *Sweetapple v. Bindon*, 2 Vern. 536; *Otway v. Hudson*, 1 Vern. 583; *Chasborne v. Scarfe*, 1 Atk. 603; *Chaplain v. Chaplain*, 3 P. Wms. 229; *Morgan v. Morgan*, 5 Madd. 408; *Meacham v. Bunting*, 156 Ill. 586, 41 N. E. Rep. 575; *Carson v. Fuhs*, 131 Pa. St. 256

⁴ *Sweetapple v. Bindon*, 1 Vern. 536; *Otway v. Hudson*, 1 Vern. 583; *Harrod v. Myers*, 21 Ark. 592; *McDaniel v. Grace*, 15 Ark. 465. And see *Frey v. Allen*, 9 App. D. C. 400.

⁵ *Otway v. Hudson*, 1 Vern. 583.

⁶ *Chasborne v. Scarfe*, 1 Atk. 603.

⁷ *Hearle v. Greenbank*, 3 Atk. 695,

716.

the uses and profits are to go to her individual separate use and benefit.¹ He is also entitled to curtesy in contingent uses.² He has the same right in an equity of redemption; for this is really an equitable estate.³

§ 346. Exclusion of right in grant to wife.—Whenever by the terms of the grant or conveyance it is manifest that the grantor intended to limit the use and enjoyment of the estate to the wife, either individually or otherwise, free from the claims, debts and all rights of the husband of whatsoever kind, he can then have no curtesy interest. In all such cases the courts will deny the husband his right of curtesy.⁴ So, where land was conveyed to a trustee in trust “to and for the sole and separate use, benefit and behoof of the wife . . . for her sole and separate benefit, separate and apart from her husband, and wholly free from his control and interference, debts and liabilities, curtesy, and all interests whatever,” it was held that the husband could have no curtesy in the land.⁵ Such a restriction or limitation in the grant shuts out the right of curtesy in the second, as well as the first, husband.⁶ And no doubt any number of succeeding husbands would have to share the same fate. But the rule, it seems, only obtains in equity; for, at common law, a grant of an estate of inheritance could not be made so as to cut off the right of the husband to his curtesy in the estate granted.⁷ But the rule is, in all cases, the intention to cut off the right of curtesy must be clearly expressed in, or clearly implied from, the instrument conveying the estate, else curtesy will attach and be effective.⁸ The mere

¹ *Morgan v. Morgan*, 5 Madd. 408.

² *McDaniel v. Grace*, 15 Ark. 465; *Harrod v. Myers*, 21 Ark. 592, 601; *Rank v. Rank*, 120 Pa. St. 191, 13 Atl. Rep. 827.

³ *McDaniel v. Grace*, 15 Ark. 465; *Robinson v. Lakenan*, 28 Mo. App. 135. See, too, *Hall v. Crabb* (Neb.), 76 N. W. Rep. 865.

⁴ *Pool v. Blakie*, 53 Ill. 495; *Monroe v. Van Meter*, 100 Ill. 347; *Meacham v. Bunting*, 156 Ill. 586, 41 N. E. Rep. 175; *Haight v. Hall*, 74 Wis. 152, 42 N. W. Rep. 109; *McCulloch v. Valentine*, 24 Neb. 215, 38 N. W. Rep. 854; *Stokes v. McKibbin*, 13 Pa. St. 267.

⁵ *McTigue v. McTigue*, 116 Mo. 138, 22 S. W. Rep. 501.

⁶ *Rautenbusch v. Donaldson* (Ky.), 18 S. W. Rep. 536.

⁷ *McTigue v. McTigue*, 116 Mo. 138, 22 S. W. Rep. 501; 1 Washb. Real Prop. (5th ed.), p. 176, § 15.

⁸ *Baker v. Heiskell*, 4 Cold. (Tenn.) 642; *Carter v. Dale*, 3 Lea (Tenn.), 710; *Beecher v. Hicks*, 7 Lea (Tenn.), 207; *Tillinghast v. Cogeshall*, 7 R. I. 383; *Mitchell v. Moore*, 16 Gratt. (Va.) 275; *Talbot v. Calvert*, 24 Pa. St. 327; *Nightingale v. Hidden*, 7 R. I. 115.

fact, therefore, that land is conveyed to the wife not subject to the control or disposal of her husband will not defeat the estate.¹ Frequently, in these instruments, power of disposition is conferred upon the wife; and when she exercises the power thus vested in her, and disposes of the property as authorized to do by the instrument conveying it to her, the right of curtesy would be cut off. But if she should die without doing so, the estate would not be defeated.²

§ 347. Bankruptcy of the husband — Estate passes to assignee in bankruptcy.—The estate by the curtesy which a husband is entitled to out of his wife's lands passes upon the assignment of all his property in bankruptcy to his assignee; and the assignee may sell and dispose of this as assets, just as he may any other property which the husband may have.³ But unless the title of the wife becomes vested in her before the husband's bankruptcy and discharge, the right of curtesy will not pass by virtue of the assignment in bankruptcy.⁴ For, unless this be the case, the husband has no estate which he can assign, and the assignee, of course, could take none by virtue of the assignment.

§ 348. Exists in an estate which would vest, by operation of law, in the children of the wife.—While there is no curtesy in a life estate merely, yet where land is conveyed to the wife for life and to her heirs after her death, she leaving issue which would succeed to the estate upon her death, the husband will be entitled to curtesy.⁵ In fact, under such a grant, the wife would take the absolute fee under the rule in *Shelley's Case*.⁶ Estates of this kind are really estates in fee. The

¹ *Mullany v. Mullany*, 4 N. J. Eq. 16; *Tremmel v. Kleiboldt*, 75 Mo. 255; 1 Washb. Real Property (5th ed.), p. 176.

² *Baker v. Heiskell*, 1 Cold. (Tenn.) 641; *Frazer v. Hightower*, 12 Heisk. (Tenn.) 94; *Ege v. Medlar*, 82 Pa. St. 86.

³ *Cooper v. McDonald*, L. R. 7 Ch. Div. 288; *Gardner v. Hooper*, 3 Gray, 398; *Folley v. Tyrer*, 14 Sim. 125; *In re McKenna*, 9 Fed. Rep. 27.

⁴ *Gibbins v. Eyden*, L. R. 7 Eq. 371.

⁵ *Odom v. Beverly*, 32 S. C. 107, 10 S. E. Rep. 835.

⁶ *Hardage v. Stroupe*, 58 Ark. 303, 24 S. W. Rep. 490; *Lane v. Utz*, 130 Ind. 235, 29 N. E. Rep. 772; *Doebler's Appeal*, 64 Pa. St. 9; *Starnes v. Hill*, 112 N. C. 1, 16 S. E. Rep. 1011; *Hagemann v. Hagemann*, 129 Ill. 164, 21 N. E. Rep. 814; *Polk v. Faris*, 8 Yerg. (Tenn.) 209; *Van Olinda v. Carpenter*, 127 Ill. 42, 19 N. E. Rep. 868; *Bender v. Fleurie*, 2 Grant, Cas. 345;

grantee can do all that could be done in the case of a direct and unlimited grant in fee, except in jurisdictions where the rule in *Shelley's Case* is repudiated by the courts or abolished by statute, in which event there would, no doubt, be no right of curtesy, for the estate would amount only to an estate for life and the heirs would not take really by descent.

§ 349. Right to, in mining lands.—As mining is a legitimate outcome of lands owned or used for this purpose, or susceptible of such development and profit, it naturally follows that the husband has curtesy in lands of this kind as well as any other, and may, during his life, after the death of the wife, enjoy the lands in the same manner that she could while living, doing, of course, nothing to permanently injure the same further than is necessary to the proper enjoyment of the profits of the land. Upon this principle it is held that the husband even has an estate by the curtesy in lands of which his wife, in her lifetime, has sold the surface, reserving the mines in the soil, these being properly a parcel and part of the land itself.¹

§ 350. Proceeds of land — Rights of husband.—Where the land of a wife in which the husband has his estate by the curtesy is sold by operation of law, the husband is entitled to the use of the proceeds in like manner that he would have been entitled to the possession and use of the land for the period of his natural life.² So, where land was condemned, under the power of eminent domain, in which the husband had a vested interest by virtue of his right to curtesy, it was held that the husband was entitled to the use of all the proceeds of the land the remainder of his life, to the exclusion of the children of the marriage, though the proceedings to condemn had been instituted during the life of the wife, who died pending final sale.³

§ 351. Gift from husband — Right of curtesy.—Ordinarily, if a husband makes a gift of lands in fee to his wife, he will not be deprived of his right to curtesy merely because he was

Wicker v. Ray, 118 Ill. 472, 8 N. E. Rep. 835; Andrews v. Spurtin, 35 Ind. 262; Crockett v. Robinson, 46 N. H. 454; Ryan v. Allen, 120 Ill. 648, 12 N. E. Rep. 65.

¹ Appeal of Rankin (Pa.), 16 Atl. Rep. 82.

² In re Camp, 126 N. Y. 377, 27 N. E. Rep. 799.

³ In re Camp, 126 N. Y. 377, 27 N. E. Rep. 799; reversing 10 N. Y. S. 141.

the grantor from whom the wife took her title to the realty. At common law there could not be such a transaction between the husband and wife. If the husband wished to convey land to his wife, he had to do so through the medium of a trustee. His conveyance to the trustee extinguished his title, and the trustee, being a stranger, could transmit a good and unincumbered title to the wife. Statutes at the present day very often authorize transactions and conveyances between husband and wife in a general way. But, upon principle, it would seem to make no difference whether the husband should convey by means of a trustee, as he had to do at common law and may still do, or whether he convey direct to his wife by virtue of statutes authorizing it; the result is the same. The wife takes title from the husband. She is the owner in fee. If there be seisin, the valid marriage, and issue born alive capable of inheriting, there is no good reason why the husband should not be entitled to curtesy in real estate thus owned by his wife.¹ But where the husband settles personalty upon his wife in a post-nuptial agreement, and after issue born of the marriage, and the wife purchases realty with the personalty thus received from her husband, it is held in Virginia that the husband has no right of curtesy.² At common law a conveyance by a husband of realty to his wife was a nullity, as the two could not contract with each other; and, as the title still remained in the husband, his estate was not affected by such an attempted transfer.³

§ 352. **Right of, in leasehold estates.**—A leasehold estate is not an estate in fee or in tail. It is not of such dignity in law as an estate for life, and the husband, at common law, has no estate by the curtesy in lands held by his wife only under a lease.⁴ A leasehold estate is not an estate for life; for if the estate be leased indefinitely it might be terminated before death of the lessee, while if the land be leased for life, this, if effective for any purpose, would vest in the lessee an estate for life, in which event the husband would have no curtesy, for

¹ Tremmel v. Kliebaldt, 6 Mo. App. 549; Soltan v. Soltan, 93 Mo. 307, 6 S. W. Rep. 95; Vanderveer v. Vanderveer, 49 Hun, 608, 1 N. Y. S. 897; Ball v. Ball (R. L.), 40 Atl. Rep. 234.

² Dugger's Children v. Dugger, 84 Va. 130, 4 S. E. Rep. 171.

³ Carrington v. Richardson, 79 Ala. 101.

⁴ Lewis v. Glass, 92 Tenn. 147, 20 S. W. Rep. 571.

the death of the wife would terminate the estate, and the issue of the marriage could not in any event inherit the estate from the maternal ancestor.

§ 353. **Effect of divorce.**—As there must be the death of the wife in order to perfect the estate by curtesy initiate, it necessarily follows that, after a divorce unconditionally dissolving the marriage, there can never be an estate by the curtesy in the lands of the divorced wife; for, by the decree of divorce, the wife becomes a stranger to the former husband, is no longer his wife, the coverture is ended, and even though the wife thus divorced should die in the life-time of the husband, yet the death would not thereby take place during coverture, and it would not, in law, be the death of the wife.¹ But a divorce *a mensa et thoro* does not dissolve the marriage, and does not preclude the right of the husband to his estate by the curtesy.² And it is held in Illinois that an absolute divorce does not defeat the curtesy initiate which vests in the husband upon the birth of issue, if the ground of the divorce be not such as to render the marriage absolutely void *ab initio*.³ In Pennsylvania, by statute, a husband who wilfully and maliciously deserts his wife forfeits his right to curtesy in her lands, and when he has deserted her the burden of proof is cast upon him to show that he had grounds for deserting her, such as would entitle him to a divorce.⁴ Whether or not the desertion was malicious under this law is generally a question of fact.⁵ And in no case is a husband entitled to curtesy in the lands of his wife which come to her after an absolute divorce rendered by a court of competent jurisdiction.⁶ In Missouri it is provided that “in all cases of divorce from the bonds of matrimony, the guilty party shall forfeit all rights and claims under and by virtue of the marriage.” And it was held under this law that, where a divorce was had by reason of the fault of the husband, he for-

¹Wheeler v. Hotchkiss, 10 Conn. 225; Starr v. Pease, 8 Conn. 541; Howey v. Goings, 13 Ill. 95.

²Beckwith v. Whitfield, 3 P. Wms. 266; Hunter v. Whitworth, 9 Ala. 965, 967; Smoot v. Lecatt, 1 Stew. (Ala.) 590.

³Meacham v. Bunting, 156 Ill. 586, 41 N. E. Rep. 175.

⁴Bealor v. Hahn, 132 Pa. St. 242, 19 Atl. Rep. 74; Bealor v. Hahn, 117 Pa. St. 169, 11 Atl. Rep. 776.

⁵Hart v. McGrew (Pa.), 11 Atl. Rep. 817.

⁶Schult v. Moll, 10 N. Y. S. 703; In re Estate of Ensign, 37 Hun, 152.

feited all his right of curtesy, even as to realty he bought and had conveyed to her.¹

§ 354. None in life estates.—A conveyance to a wife for life only does not establish any right of curtesy in the husband to the lands thus held and enjoyed by the wife, even though all the other requisites of an estate by the curtesy exist.² Nor does a conveyance to the wife to hold only during the life of another; for her estate may be determined by the death of such other persons without any act on her part.³ The estate for life, whether it be for the life of the wife or that of another, is not an estate of inheritance. Though the wife should leave children and should survive her husband, these could not inherit, for death of the wife or other person, as the case may be, will have terminated the estate in the wife, and the husband, as a general rule, can have no curtesy unless the children of the marriage could have inherited. Issue born would not suffice unless it could inherit, and an estate for life is not inheritable, but reverts to the grantor by operation of law upon the death of the life tenant.

§ 355. Estate subject to execution for debts of husband.—At common law the estate of curtesy initiate was a vested right. It was the subject of sale by the husband, and was liable to be seized and sold under execution to satisfy a judgment against him.⁴ But under modern statutes authorizing and empowering a wife to sell and convey her realty without the interference or consent of her husband, free from his right of curtesy, his curtesy initiate is seriously affected and could not, ordinarily, be the subject of sale under execution. At least a sale of the husband's right of curtesy under execution before the death of the wife could not affect her right to still convey the realty free, not only from the husband's estate by the curtesy, but likewise from any claim any purchaser at the execu-

¹Schuster v. Schuster, 93 Mo. 438, 261; Boykin v. Rain, 28 Ala. 332; 6 S. W. Rep. 259. Lang v. Hitchcock, 99 Ill. 550; Bo-

²Roberts v. Dexivell, 1 Atk. 607.

³Slead v. Platt, 18 Beav. 50.

⁴Cole v. Van Riper, 44 Ill. 58; Mc- 274, 33 N. E. Rep. 51; In re McKenna, 9 Fed. Rep. 27; Schermerhorn v. Mil-
Neer v. McNeer, 142 Ill. 388, 32 N. E. ler, 2 Cowen, 439.
Rep. 681; Day v. Cochran, 24 Mass.

tion sale might make by virtue thereof. But these laws do not prevent the creditor from selling under execution the estate by the curtesy of the husband after the death of the wife in any lands she died seized, possessed and undisposed of at the time of her death.¹ In Missouri the estate of curtesy is exempt by statute from sale under execution during coverture, and it is properly held under this law that no sale thereof can lawfully be made while the coverture exists.² But this statute doubtless means also that the exemption from sale applies only so long as the coverture of the wife who owns the lands exists, and no doubt the estate by the curtesy of the husband in the lands of his first wife might be sold after her death, though the husband at the time of the sale be married to another and the marriage is in full force and effect. And under statutes providing that the property of the wife shall be and remain hers with the power of disposal, and shall not be liable for his debts, he has no estate by the curtesy which can be reached by execution.³ If the wife has the right by statute to lease or sell her realty, and during life executes a lease which does not expire until after she dies, a purchaser at a sale under execution of the husband's estate by curtesy will be postponed to the rights of the lessee, and is not entitled to possession until the expiration of the lease.⁴ And this being true, it necessarily follows that the husband could not assert his right of curtesy any sooner than could the purchaser of his right at execution sale.

§ 356. Homestead exemptions.—Where the laws or constitution of a state provide that the homestead of the mother shall vest in her minor children at her death during their minority, this claim of the children is paramount to that of the husband for curtesy in the lands of his wife. Though the husband would, ordinarily, be tenant by the curtesy initiate upon

¹ McCaskill v. McCormac, 99 N. C. 548, 6 S. E. Rep. 423; Thompson v. Wiggins, 109 N. C. 108, 14 S. E. Rep. 301; Stanley v. Bonham, 52 Ark. 354, 12 S. W. Rep. 706; Welsh v. Solenberger, 85 Va. 441, 8 S. E. Rep. 91; Brown's Adm'x v. Bockover, 84 Va. 424, 4 S. E. Rep. 745. ² Churchill v. Hudson, 34 Fed. Rep. 14. ³ Hitz v. National Metropolitan Bank, 111 U. S. 722, 4 Sup. Ct. Rep. 613. ⁴ Forbes v. Sweezy, 8 Neb. 520, 1 N. W. Rep. 125.

the birth of issue of his marriage, yet where the laws, at the time of the marriage, authorize the wife to dispose of the lands free from the husband's right of curtesy, and provide that, upon the death of the mother, the land of which she was seized and possessed at the time of her death, and which she was entitled by law to hold as exempt from all claims of whatsoever kind, and that, after her death, a life estate shall vest, by operation of law, in her infant children so long as they are under minority, the husband's right must yield to the right of such children. His marriage must be held to contemplate the law as it exists at the time thereof and to become a part and parcel of the law itself. This being true, his curtesy is postponed to the estate thus given the infant children by law.¹

§ 357. Ante-nuptial marriage settlement.—The right of curtesy, as well as the right to dower, may be relinquished by an ante-nuptial marriage settlement or contract, whereby the husband renounces his estate by the curtesy in the lands of his prospective wife.² In such settlements any sufficient consideration will sustain the agreement. This may be the mutual relinquishment by the parties of all rights in the property of the other, or if only one be possessed of property the marriage itself will be an ample consideration where there is no fraud, whether the relinquishment refer to property owned at the present or to be owned in the future.³ Marriage itself is one of the highest considerations known to the law. In fact, it is often mentioned in the books as the very highest.

§ 358. Joint mortgage by husband and wife of wife's land — Effect on right of curtesy.—When the husband joins in a conveyance by his wife of her land to secure her individual indebtedness, this has the effect of defeating the right of curtesy to the extent that the land may be sold under the mortgage. The purchaser would take a title free from the husband's estate, of course. Should the mortgage debt of the wife be paid without foreclosure, the mortgage would cease to be a lien, and the initiate estate by curtesy would revest in the hus-

¹ Thompson v. King, 54 Ark. 9, 14 S. W. Rep. 925; Littell v. Jones, 56 Ark. 139, 19 S. W. Rep. 497.

² White v. White, 20 Misc. Rep. 481, 46 N. Y. S. 658.

³ White v. White, 20 Misc. Rep. 481, 46 N. Y. S. 658.

band.¹ But if the conveyance be made by both the husband and wife to secure a debt of the husband, upon the death of the wife and a foreclosure of the mortgage the proceeds of the interest of the husband in the land will first be applied to the payment of the debt secured, and the remainder of the proceeds will be directed to be paid to the children of the wife, unless it required less than the value of the husband's estate to liquidate the debt, in which event he would be entitled to the proceeds of his estate less the amount required to pay the indebtedness.² Where the husband, who is the guardian of his infant children, his wife being dead, petitions the proper court for a sale of the land of the wife, alleging that the ownership of the land is in himself and the children, a purchaser at such sale will take the land free from the right of curtesy, and the husband will be precluded by the rule of equitable estoppel from claiming any right in the land as against the purchaser.³

§ 359. Husband living apart from wife.—The estate by the curtesy is not lost because the husband deserts his wife or lives apart from her, either by agreement or contrary to her wishes.⁴ This is true even though the husband deserts his wife and lives in adultery with another. His desertion and immoral conduct, however reprehensible in him, do not serve the purpose of dissolving the marriage or affecting the coverture, nor is the ill-treated spouse any less his wife in law.⁵ The parties may, upon an agreement of separation, mutually release to each other all claims against the property of the other, and such a contract will bar the right of curtesy.⁶ This is true though the agreement to live apart is invalid because against public policy.⁷ But the mutual agreement as to property rights could not be

¹ *Baker v. Baker*, 167 Mass. 575, 46 N. E. Rep. 391; *Hayden v. Pierce*, 165 Mass. 359, 43 N. E. Rep. 119; *Campbell v. McBee*, 92 Va. 68, 22 S. E. Rep. 807; *In re Freeman*, 116 N. C. 199, 21 S. E. Rep. 110; *Boykin v. Rain*, 28 Ala. 332.

² *Shields v. Yellman* (Ky.), 39 S. W. Rep. 30.

³ *Brooks' Assignee v. Summers* (Ky.), 38 S. W. Rep. 1047.

⁴ *Beckwith v. Whitfield*, 3 P. Wms. 266, 276. And see *Duffy v. Harris* (Ark.), 45 S. W. Rep. 545.

⁵ *Beckwith v. Whitfield*, 3 P. Wms. 266, 276.

⁶ *Luttrell v. Boggs*, 168 Ill. 361, 48 N. E. Rep. 171.

⁷ *Luttrell v. Boggs*, 168 Ill. 361, 48 N. E. Rep. 171.

upheld except under a statute enabling the husband and wife to contract with each other, a thing they cannot do under the common law. Indeed, it is rather strange that the law should recognize such conveyances or arrangements whereby the husband and wife agree to practically ignore or dissolve the marriage relation and make a division of their property among themselves instead of resorting to the divorce courts to effect this end. It is in a sense permitting them to trifle with the marriage relation and to repudiate many of its sacred duties and obligations. They should not be permitted to live apart except when a cause of divorce exists. And when such a cause exists, their dissolution should be declared by the courts instead of by the consent of the parties.

§ 360. Husband may convey estate of.—The estate by the curtesy is not personal; that is, the husband is not required to enjoy the life estate to which he succeeds at the death of his wife, but may sell or convey the same just as he could any other interest in realty; and, upon a conveyance of the estate by curtesy, properly executed, the grantee succeeds to all the rights and privileges which the husband himself could have enjoyed but for the sale.¹ He may convey it as effectively by joining in an absolute deed with his wife as a party grantor; and this is true though when the deed was executed the wife was an infant and afterwards repudiated her act upon arriving at majority. The husband, however, having been *sui juris*, his estate passed irrevocably.² The fact that the deed of the wife proves ineffectual does not prevent his interest from passing, for he may dispose of this regardless of his wife, and certainly can do so as effectively when she joins in his deed, or he in hers, as the act of the wife cannot take from nor add to his power to convey his estate. The conveyance as to his interest is his act, not that of his wife.

§ 361. Is a vested right.—While the law-making power may take away the right of curtesy before it vests,—may, in other words, abolish curtesy as to future estates, or empower

¹ *Morris v. Edmonds*, 43 Ark. 427; *rod v. Myers*, 21 Ark. 592; *Smith v. Jackson v. Jackson*, 114 Ill. 274, 33 *Patterson*, 95 Mo. 525, 8 S. W. Rep. N. E. Rep. 51; *Thompson v. Wiggins*, 567; *Shortall v. Hinckley*, 31 Ill. 219. 109 N. C. 508, 14 S. E. Rep. 301; Har- ² *Harrod v. Myers*, 21 Ark. 592.

the wife to make sale of her lands free from the right of curtesy as to all acquisitions after the passage of the law,—yet the right to curtesy upon marriage and the birth of issue, the other requirements existing, becomes a vested right in the husband, of which the wife cannot deprive him by grant, nor the legislature by enactment.¹ But the vested right is not acquired by marriage merely; there must be issue born alive, capable of inheriting and transmitting inheritance, to effect a vested estate by the curtesy in any sense, and death of the wife to give the estate consummation.² The inchoate right to curtesy arising upon the marriage alone is not such a vested right as the legislature is forbidden to take away.³ For, until all the contingencies upon which the estate hinges have transpired, the estate is a mere expectancy, becoming consummate in the future, but not effective until all the contingencies have taken place. The legislature, therefore, may abolish the estate and thereby prevent it ripening into consummation.

§ 362. Laches of husband.— Though the husband may have issue born alive of his wife capable of inheriting, and while every requirement of the estate by the curtesy may exist, yet the husband may lose this right of curtesy by his own negligence or laches in not asserting his right within a reasonable time.⁴ But laches will not be imputed to the husband nor will his estate be barred until the death of the wife, for until then he is only a remainder-man, whose right of entry is held in abeyance during the life of the wife, and he is not required to assert a right of possession until that right has matured.⁵ But as soon as the death of the wife takes place, the husband has the right to assert his interest in the land of his wife, and the law properly requires him to avail himself of the opportunity before time has run to the extent that he would be precluded from so doing by the statute of limitations or the rule of laches.

¹ Jackson v. Jackson, 144 Ill. 274, 83 N. E. Rep. 51; McNeer v. McNeer, 142 Ill. 388, 32 N. E. Rep. 681; Mitchell v. Violet (Ky.), 47 S. W. Rep. 195.

² Littell v. Jones, 56 Ark. 139, 19 S. W. Rep. 497.

³ Alexander v. Alexander, 85 Va. 353, 4 S. E. Rep. 335.

⁴ Thomas v. Hughes (Ky.), 25 S. W. Rep. 591. In this case the husband

waited fourteen years before asserting his right, and it was properly held that he had been guilty of laches and could not assert the right which otherwise would have been his. To like effect see Shortall v. Hinckley, 31 Ill. 219.

⁵ Foster v. Marshall, 2 Foster (N. H.), 491.

§ 363. Extent of estate.—The extent of the estate by the curtesy is the proper and full enjoyment of the realty of the wife by the husband after her death for the term of his natural life. This enjoyment is confined within such limits that the estate of the wife, upon the death of the husband, may revert uninjured to those succeeding thereto.¹ The estate by the curtesy gives the husband the right to enjoy the realty for any legitimate purposes for which it is adapted. If it be farming lands, he may use any timber thereon for the erection of any suitable and necessary buildings for farming purposes, as well as for fences and like uses. He may cut and use what is necessary for fuel, and, within reasonable bounds, may clear and put in a state of cultivation uncleared land so long as this does not go to the extent of seriously impairing the value of the realty because of the loss of the timber.² He has no right by virtue of this estate to cut the timber off and sell the same, or sell it to another with the privilege of entering upon the premises to cut and take it away.³ The right of the husband to his curtesy is superior to the right of creditors of the wife to resort to her realty in satisfaction of their claims against her. This is true though, in the life-time of the wife, creditors might have levied an execution on her realty and cut out the estate by curtesy under a sale by virtue of the execution. The instant the wife dies, the initiate estate becomes perfect and takes precedence over a judgment lien.⁴ It is superior to that of a grantee who takes the land just before the marriage, where the purpose of the intended wife is to defraud the husband and cheat him out of his estate, and this purpose is known to the transferee, or even when not so known where no valuable consideration other than love and affection passes.⁵

§ 364. Effect of statutory changes in the common law with reference to the right of the wife to own property separate from her husband.—In practically all the American states at this day statutes have been enacted enlarging the common-law rights of married women to the extent that they

¹ *McLeod v. Dial*, 63 Ark. 10, 37 S. W. Rep. 306. 334; *Clemence v. Steere*, 1 R. I. 272; *Davis v. Clark*, 40 Mo. App. 515.

² *McLeod v. Dial*, 63 Ark. 10, 37 S. W. Rep. 306. ⁴ *Hampton v. Cook*, 64 Ark. 353, 42 S. W. Rep. 535.

³ *Owen v. Hyde*, 6 Yerg. (Tenn.) ⁵ *Freeman v. Hartman*, 45 Ill. 56.

may own, buy and sell property with greater or less restrictions upon the power thus conferred. Necessarily such statutes have a tendency to change the common-law estate by the curtesy, for this is an estate in the lands of the wife given to the husband by the grace of the law in order the better to enable him to educate and properly raise the offspring of his wife. He had right of possession of the lands of the wife during coverture, and he was, during that time, entitled to the use thereof and the rents and profits arising therefrom. At the death of his wife, issue being born alive capable of inheriting, his right of possession and to the rents and profits continued by virtue of the estate by curtesy arising by operation of law upon the happening of these events. No act of the wife could deprive him of this right; for, while covert, she could not make a contract or conveyance whereby she might convey same. But modern statutes have, in many instances, materially enlarged the powers of a *feme covert*, whereby she is empowered to convey her property to the extent permitted by the statute enlarging her rights. These statutes necessarily have a tendency to, and do, invade the common law to an extent, in many instances, that materially affects the right of the husband to the estate by curtesy as known at common law in the lands of the wife. Adhering to the familiar canon of construction which forbids an invasion of the common law by statutory enactment further than is necessary upon a strict construction of the law, the courts usually hold that the estate by the curtesy is not lost nor affected, except to the extent that the invading statute plainly and clearly takes away the right. So, where the statute, as is now often the case, gives the wife the absolute power to dispose of her realty, and though, by virtue of such statute, she may defeat her husband's contingent estate of curtesy, yet if she does not convey her land, as she may do, or if she convey only part of it, her husband will be entitled to that part upon her death which she does not convey in her life-time.¹ In Massachusetts the husband is given an interest in the real

¹ Ransom v. Nichols, 22 N. Y. 110; Ark. 153; Smith v. Smith, 21 D. C. Hatfield v. Sneden, 54 N. Y. 280; 289; Bozarth v. Largent, 128 Ill. 95, Barnes v. Underwood, 47 N. Y. 351; 21 N. E. Rep. 218; Thompson v. Wiggins, 109 N. C. 508, 14 S. E. Rep. 301; Neelly v. Lancaster, 47 Ark. 175, 1 S. W. Rep. 66; Bagley v. Fletcher, 44 Milwee v. Milwee, 44 Ark. 112.

estate of his wife not exceeding \$5,000 where she has no living issue at the time of her death, and, if she have more realty than amounts to \$5,000, he has a curtesy estate in that.¹ Nor does a statute providing that "every married woman shall have the right to hold, possess, control and dispose of her property as if she were a *feme sole*, and that it shall belong to her and not to her husband, providing, however, that she shall have no power to mortgage or convey her real estate unless joined by her husband," defeat curtesy.² And a statute providing that the lands of the wife shall be free from the debts or obligations of the husband does not take away the estate.³ That they are not subject to nor liable for the debts of the husband is not inconsistent with the idea of the right to curtesy, for this is only a life estate; and the land, when this right terminates by the death of the husband, becomes subject to the laws of descent, the rights of the heirs of the wife which have been kept in abeyance because of the husband's rights and interest then springing into existence and becoming perfect.

§ 365. **Sale of land by wife.**—At the present time there generally exist statutes authorizing married women to convey their separate real estate with like effect as though they were unmarried. This is an invasion of the common law, and the effect of these statutes thus enlarging the power of married women is to confer upon them the power to dispose of their realty free from the right of the husband to claim his estate by the curtesy.⁴ And the estate by curtesy is defeated by a bequest of the land by the wife, though a will cannot take effect till the death of the testator.⁵ But where the statute authorizing the wife to convey her lands expressly limits this right to estates to which her husband would not be entitled by

¹ *Howe v. Berry* (Mass.), 47 N. E. Rep. 104.

² *Appeal of Cooke*, 132 Pa. St. 533, 19 Atl. Rep. 274; *Commissioners of Rouse's Estate v. Directors of Poor*, 169 Pa. St. 116, 32 Atl. Rep. 541. A like conclusion is reached under similar laws elsewhere. *Luntz v. Greeve*, 102 Ind. 173, 26 N. E. Rep. 128.

³ *Allen v. Roush*, 15 Mont. 446, 39 Pac. Rep. 459.

⁴ *Kiracofe v. Kiracofe*, 93 Va. 591, 25 S. E. Rep. 601.

⁵ *Kiracofe v. Kiracofe*, 93 Va. 591, 25 S. E. Rep. 601; *Chapman v. Price*, 83 Va. 392, 11 S. E. Rep. 879; *Cooper v. McDonald*, 7 Ch. Div. 288, 300; *Hutchings v. Commercial Bank*, 91 Va. 68, 20 S. E. Rep. 950.

law at her death, she cannot bequeath the husband's estate by the curtesy though he consent in writing for her to do so.¹ Of course it is otherwise where the statute expressly authorizes the devise where the husband consents in writing.² In West Virginia it is provided that a husband may renounce a provision made for him in the will of his wife, and in such case he shall have such share in his wife's realty as though she had died intestate leaving children. It is held under this statute that the failure of the husband to renounce the will will not preclude his right of curtesy.³

§ 366. **Statutory abolition of.**—In a number of the states the estate by curtesy has been abolished by statute. In some instances the husband is given a greater right in the estate of the wife, in lieu of curtesy, than he would have had but for the change. In others the estate is arbitrarily abolished; and still, again, the husband is sometimes given a part such as would amount to a child's interest, or other part in lieu of curtesy. The legislature of a state may lawfully abolish this estate where the action of the law-making power does not have the effect of destroying or affecting vested rights. But, to the extent that vested rights may be taken away or impaired, it is beyond the power of the legislature to change the estate.⁴ A constitutional enactment providing that the real and personal property of any female acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written consent of her husband, conveyed by her as if she were unmarried, is held to entirely abolish the right of curtesy initiate.⁵ But, even under this law, if the wife should die with-

¹ Middleton v. Steward, 47 N. J. Eq. 293, 20 Atl. Rep. 846. See also Soltan v. Soltan, 93 Mo. 307, 6 S. W. Rep. 95. Ex'rs v. Von Ahlefeldt, 33 W. Va. 663, 11 S. E. Rep. 46.

² Silsby v. Bullock, 10 Allen (Mass.), 94. ⁴ McNeer v. McNeer, 142 Ill. 388, 32 N. E. Rep. 681.

³ Cunningham v. Cunningham, 80 W. Va. 600, 5 S. E. Rep. 139; Beirne's ⁵ Walker v. Long, 109 N. C. 510, 14 S. E. Rep. 298; Moore v. Darby (Del.), 18 Atl. Rep. 768.

out disposing of her realty, the estate by the curtesy in the husband would become perfect.¹ In Mississippi the statute provides that "dower and curtesy, as heretofore known, are abolished."² This is held not to entirely abolish curtesy, but only to convert it into a contingent estate.³

¹Thompson v. Wiggins, 109 N. C. 508, 14 S. E. Rep. 301.

³Stewart v. Ross, 50 Miss. 776; Hill v. Nash, 73 Miss. 849, 19 S. Rep. 707. •

²Code Miss. 1892, § 2291.

CHAPTER V.

DOWER.

§ 367. Definition.

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- 435. Allotment of, at common law.
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§ 367. Definition.—Dower at common law is “where the widow was entitled, during her life, to a third part of all the

lands and tenements in fee-simple or fee-tail of which her husband was seized at any time during the coverture, and of which any issue she might have had might by possibility have been heir.”¹ It will be seen at once that dower is a life estate, and, as it cannot take place until the death of the husband, and further, as the husband might survive the wife, in which event her heirs would have no right to the estate by descent, it is a contingent estate depending upon the death of the husband and the survivorship of the wife. “It is a freehold estate growing out of the marriage, seisin, and the death of the husband. It takes by way of lien created by and at the time of marriage.”² Under the old law there were various kinds of dower, viz.: Dower by custom, which was an estate to which the widow became possessed by virtue of some local custom. Dower *ad ostium ecclesiæ*, where the wife was endowed at the door of the church by her husband at the time of the marriage. Dower *ex assensu patris*, which was vested in the wife at the door of the church out of the lands of the father of the husband, with the consent of the former, instead of the lands of the husband himself. Dower *de la plus belle*, which was acquired by suit in chivalry for dower, by which the widow was required to select a portion of any lands which she might hold as guardian in socage, whereby the dower interest in the lands of her husband which was held in chivalry was released. Finally, dower by common law, which entitles the wife during her life, after the death of her husband, to a third of all the lands held by her husband during coverture in fee-simple or fee-tail.³ This last species of dower is practically the only kind known in this country, except that it has been modified in some states more or less radically by statute, and in some entirely abrogated. At common law three things are required to create the estate of dower: A valid marriage, seisin in the husband at some period of the coverture, and survival of the wife.⁴ Of course dower is not restricted to improved land, but attaches with equal effect to all the lands of the husband.⁵

¹ Bouvier's Law Dict., “Dower;”
Pinkham v. Pinkham (Neb.), 76 N.
W. Rep. 411.

² Tate v. Jay, 31 Ark. 576, 579.

³ See Bouvier's Law Dict., “Dower.”

⁴ Kennedy v. Nedron, 1 Dall. 415.

⁵ Hickman v. Irvine's Heirs, 3 Dana
(Ky.), 121.

§ 368. **Necessity for valid marriage as a condition.**— There can be no dower interest in a woman unless at some time during the coverture there is a seisin in her lawful husband. Marriage — a valid and binding marriage — is a cardinal requisite to the estate of dower. So there is no dower estate where the marriage is voidable, except while the marriage is actually in force and unavowed. When it is dissolved by reason of the ground of avoidance, the dissolution relates back to the time of the marriage and entirely cuts out any right of dower of the wife whatever.¹ But if the husband should die before a decree of nullity, the wife would become endowed of his estate at common law; for it is contrary to the policy of that law to declare a voidable marriage of no force after the death of one of the parties thereto.² But, ordinarily, the dower right of the wife will attach, though the marriage was contracted while one or both of the parties were under the age of consent, if they continued to live together after arriving at proper age.³ It is essential, in other words, that there be a lawful marriage, seisin of the husband at some time during the coverture, and, before the estate can become perfect, the death of the husband.⁴

§ 369. **Not an estate of inheritance.**— The estate which a wife has in the lands of her husband is a personal estate, and not such as will descend to her heirs at her death. It is for her benefit alone, is meant to afford her support, as far as may be, during the period of her natural life after the death of the husband, and is not such an estate as she might bequeath or convey so as to pass any interest to her heirs or strangers after her death.⁵ Of course after the death of her husband the widow may sell her dower estate after it has been allotted to her. But as she can confer on others a title of no greater dignity than that which the law gives her, it logically follows that any interest or title which her grantee might take would at once become extinguished by operation of law the instant she dies.

¹ Elliott v. Gurr, 2 Phil. Ecc. 16; ³ Coke, Litt. 33b.
 Coke, Litt. 33b; 1 Scribner, Dower ⁴ McCraney v. McCraney, 5 Iowa,
 (2d ed.), 146; Perry v. Perry, 2 Paige 232; Wait v. Wait, 4 N. Y. 95.
 Ch. 501; Jones v. Jones, 28 Ark. 12. ⁵ Truett v. Funderburk, 93 Ga. 686.
² Coke, Litt. 33b; Elliott v. Gurr, 2 20 S. E. Rep. 260.
 Phil. Ecc. 16.

§ 370. **Seisin.**—Seisin in the husband at some time during the coverture was one of the common-law requisites of the right of dower, and is usually so held to be under statutes substantially following the common law.¹ This being true, a remainder-man who dies before the life tenant is not seized of the land so as to entitle his wife to dower, as the possession of the life tenant cannot be held to be the possession of the remainder-man.² So, where the husband purchases land for his child, taking title to himself for life without any expectation of early death, and the land so purchased is not more than a reasonable proportion or provision for the child, the husband will not be so seized as to entitle the wife to dower.³ And where the husband buys land on a credit, dies before paying for same, and his heirs complete the payment of the purchase-money and take a deed direct to themselves, the husband is not so seized as to give his wife dower.⁴ If the interest of the husband in realty be such as would entitle the wife to dower, contingent upon the happening of an event which does not take place in the life-time of the husband, the wife will have no dower, for the right of seisin must exist either at the death of the husband or the seisin must be effective at some time during the coverture.⁵ Where the husband is once seized of the land during the coverture, the fact that a stranger may become the owner thereof by adverse possession during the life of the husband will not affect the dower right of the wife, any more than would a conveyance by the husband without the wife joining.⁶

§ 371. **Transitory seisin.**—In order that the wife may have an inchoate estate of dower in the lands and tenements of her

¹ 4 Kent, Comm. 38; *Young v. Moorehead*, 94 Ky. 608, 23 S. W. Rep. 511; *Cockrill v. Armstrong*, 31 Ark. 580; *Gentry v. Woodson*, 10 Mo. 225; *Ellis v. Kyger*, 90 Mo. 606, 3 S. W. Rep. 23; *Payne v. Payne*, 119 Mo. 174, 24 S. W. Rep. 781; *Kenyon v. Kenyon*, 17 R. I. 539, 24 Atl. Rep. 787; *Kanawha Valley Bank v. Wilson*, 29 W. Va. 645, 2 S. E. Rep. 768.

² *Young v. Moorehead*, 94 Ky. 608, 23 S. W. Rep. 511; *Carter v. McDaniel*, 94 Ky. 564, 23 S. W. Rep. 507; *Strawn*

v. Strawn, 50 Ill. 33; *Kellett v. Shepard*, 139 Ill. 433, 34 N. E. Rep. 254; *Watson v. Watson*, 150 Mass. 84, 22 N. E. Rep. 438.

³ *Crecelins v. Horst*, 89 Mo. 356, 14 S. W. Rep. 510.

⁴ *Morgan v. Smith*, 25 S. C. 337.

⁵ *Bush v. Bush*, 5 Del. Ch. 144. And see *Beebe v. Lyle*, 73 Mich. 114, 40 N. W. Rep. 944.

⁶ *Williams v. Williams*, 89 Ky. 381, 12 S. W. Rep. 760.

husband, it is necessary that he be seized in his own right of the property for some appreciable time. It must be something more than a mere transitory seisin, coming and going by the same act, or practically at the same time.¹ So where a father conveys land to his sons and immediately takes a conveyance back from them to secure a sum of money and an annuity, all of which is done on the same day and by the same transaction, there is no such seisin in either of the sons as to vest in the wife of any of them an estate of dower.² And where land is conveyed to a person as a naked trustee, the real interest being in another, or where the conveyance directs, and imposes the duty of, a conveyance by the grantee, the wife of the grantee will take no dower interest in such lands, as the husband is not in fact seized of the same in his own right. He could convey no title except under the limitations binding him in the transfer to him. He could exercise no option in making a conveyance, could not, in any event, appropriate the rents and profits to his own use, and could at no time exercise any acts of absolute ownership or control. Dower, therefore, is never allowed out of such an estate.³ Where the seisin of the husband is merely for an instant, it is generally held that the wife is not endowed.⁴ If land be conveyed to the husband unconditionally, however, and he afterwards conveys it by deed of trust or otherwise, the dower estate becomes effectively vested in the wife, no matter how soon after receiving title the husband conveys to another.⁵ And even where a married man bought land intending to give it to another, and held title several weeks before delivering possession of the land to the donee, it was held the right of dower attached.⁶ But this ruling is no

¹ *Holbrook v. Finney*, 4 Mass. 565; *Bullard v. Bowers*, 10 N. H. 500; *Bird v. Gardner*, 10 Mass. 364; *Gilliam v. Moore*, 4 Leigh (Va.), 30; *Roush v. Miller*, 39 W. Va. 638, 20 S. E. Rep. 663; *Crawl v. Harrington*, 33 Neb. 107, 49 N. W. Rep. 1118; *Wilson v. Davidson*, 2 Rand. (Va.) 384; *Robinson v. Shacklett*, 29 Gratt. (Va.) 99; *Summers v. Darne*, 31 Gratt. (Va.) 791; *Coffman v. Coffman*, 79 Va. 504; *Hurst v. Dulaney*, 87 Va. 444, 12 S. E. Rep. 800; *Hallett v. Parker* (N. H.), 39 Atl. Rep. 583; *Adams v. Hill*, 29 N. H. (9 Foster), 202.

² *Holbrook v. Finney*, 4 Mass. 565.

³ *McCauley v. Grimes*, 2 Gill & J. (Md.) 318.

⁴ *Snow v. Tift*, 15 Johns. 458; *Clark v. Monroe*, 14 Mass. 351; *Maybury v. Brien*, 12 Pet. 21; 2 Bl. Comm. 131, 132.

⁵ *Bullard v. Bowers*, 10 N. H. 500.

⁶ *Flanigan v. Waters*, 57 Kan. 18, 45 Pac. Rep. 56.

doubt wrong. The appropriation of the money in payment of the land converted the land purchased into personalty in a sense; at least the husband never intended to become the owner, and bought it intending it at the time for the donee, and with the fixed purpose of surrendering all title and control to the donee, which purpose was carried out fully. The land never belonged to him in fact, any more than it would have done had the title been made directly to the donee, instead of through the husband as a sort of trustee, intermediary or conduit.

§ 372. Right of widow to recover for waste and damages.—When the heir of the husband comes into possession of the estate, it is his duty to assign dower promptly. If he should remain in possession and control of the realty and commit waste, or otherwise do any act whereby it is damaged or injured, the widow will have a right of action against him for the injury thus resulting.¹ The widow also has her right of action against the alienee of the husband for any damage or waste committed after his death, though none for what may have taken place before.² In the case of an heir, the right to recover for waste or other injury dates from the death of the husband; as to the alienee, from the time of a demand for dower until an assignment thereof.³ But of course these rights of action do not affect the manner of allotting dower.⁴

§ 373. Alien wife.—It was the policy of the common law to forbid the ownership of a freehold estate by an alien. For this reason, it is held that an alien wife does not succeed to any dower interest in the lands of her husband, though the requisites of seisin, ownership and marriage exist.⁵ Usually the statutes of the various states allow dower to the widow without restricting the right of citizens or forbidding it to aliens. Some of them have modified the common law so as to forbid the right when the wife is, at the time of the death of the husband,

¹ Tiedeman, Real Property, § 135.

² 2 Scribner, Dower, p. 635; Sanders v. McMillan, 98 Ala. 144, 11 S. Rep. 750; Wood v. Morgan, 56 Ala. 397.

³ Steele v. Brown, 70 Ala. 235; McClannahan v. Porter, 10 Mo. 746; Sanders v. McMillan, 98 Ala. 144, 11 S. Rep. 750.

⁴ Tiedeman, Real Property, § 135;

Campbell v. Murphy, 2 Jones (N. C. Eq.), 357, 362.

⁵ Currin v. Finn, 3 Denio, 229; Sutliff v. Forgey, 1 Cowen, 87, 95; Mick v. Mick, 10 Wend. 379; Connolly v. Smith, 2 Wend. 59; Bennett v. Harris, 51 Wis. 251, 8 N. W. Rep. 222.

a non-resident of the state where the land is situated.¹ And these statutes are held not to be in conflict with the fourteenth amendment to the federal constitution.²

§ 374. Equitable title in husband.—At the common law the wife had no dower in the equitable estate of her husband. Until he perfected his title by redemption he had not such a tenure of, or dominion over, the property as would entitle her to this interest.³ So where a man, before his marriage, mortgaged his realty, it was held that his wife could take no dower estate therein until the mortgage was paid.⁴ But where the husband, in order to evade his wife's right of dower, purchases land, and, instead of having the legal title made to himself, has it conveyed to a third person, with whom he has an arrangement by which he can have the full and perfect enjoyment of the same, the wife will be entitled to dower just as though the legal title had been conveyed to the husband, for such an attempt to defraud her of her dower right will not be tolerated.⁵ And of course a conveyance to the husband with the understanding between the grantor and grantee that the land should be held free from dower will not defeat it.⁶ The law which vests the dower right in the wife cannot be supplanted or defeated by a conspiracy or agreement between the grantor and grantee that the wife should not have dower. If the right of the wife could be thus destroyed, the estate by dower would be a feeble one indeed.

§ 375. Equitable title coupled with payment of purchase-money.—Where the husband during the coverture purchases land on a credit, goes into possession under his purchase, and

¹ See *Pratt v. Taft*, 14 Mich. 191; *Bennett v. Harris*, 51 Wis. 251, 8 N. W. Rep. 222; *Ligare v. Semple*, 82 Mich. 438; *Atkins v. Atkins*, 18 Neb. 474, 25 N. W. Rep. 724; *Thornburn v. Doscher*, 32 Fed. Rep. 810.

² *Buffington v. Grosvenor*, 46 Kan. 730, 27 Pac. Rep. 137; *Bennett v. Harris*, 51 Wis. 251, 8 N. W. Rep. 222.

³ *Davenport v. Farrar*, 1 Scam. (Ill.) 314; *Stelle v. Carroll*, 12 Pet. 205; *Maybury v. Brien*, 15 Pet. 21; *Crabb v. Pratt*, 15 Ala. 487; *Hopkins v. Frey*, 2 Gill (Md.), 359, 364; *Blakeney*

v. Ferguson, 20 Ark. 547; *May v. Tillman*, 1 Mich. 262; *Beebe v. Lyle*, 73 Mich. 114, 40 N. W. Rep. 944.

⁴ *Stelle v. Carroll*, 12 Pet. 201.

⁵ *Stroup v. Stroup*, 140 Ind. 179, 39 N. E. Rep. 865; *Phelps v. Phelps*, 27 N. Y. S. 620; *Rabbitt v. Gaither*, 67 Md. 94, 8 Atl. Rep. 744. See, *contra*, *Phelps v. Phelps*, 143 N. Y. 197, 38 N. E. Rep. 280.

⁶ *Runke v. Hanna*, 6 Ind. 20; *Norwood v. Marron*, 4 Dev. & Bat. (N. C.) 442. And see *Taft v. Taft*, 163 Mass. 467, 40 N. E. Rep. 860.

afterwards pays the vendor during the life of the wife, though he does not take a deed, and the naked legal title remains in the vendor, the wife will be endowed, as the interest of the vendor is extinguished by the payment of the purchase-money, and he thereafter holds the legal title as a trustee for the vendee and may be compelled to convey it. The ownership in fact is then in the husband, and his wife is properly entitled to dower.¹ It seems, however, that this rule in equity must be limited to cases where the husband does not part with his equitable title before the legal title is conveyed to him. At least it is held in Maryland that the conveyance of an equitable interest in realty by the husband before the legal title is made to him will defeat the right of dower.²

§ 376. Not a vested right.—Dower is not a vested estate during the life of the husband. If it were, the death of the wife would not defeat it, but it would descend to her children unless she should relinquish it in manner provided by law for this purpose in her life-time. It is merely an inchoate right existing as such during the joint lives of the husband and wife, extinguished upon the death of the wife before the husband, and becoming vested at the death of the husband and the survival of the wife. Until the death of the husband and the survival of the wife, it is but “a mere intangible, inchoate, contingent expectancy.” It is regarded as an incumbrance on the lands of the husband, which is removed by the death of the wife first, but which cannot be defeated by any act of the husband alone. The contingent estate which arises by the mar-

¹ Kirby v. Vantreece, 26 Ark. 268; Bowie v. Berry, 3 Md. Ch. 339; Pulling v. Pulling, 97 Mich. 375, 56 N. W. Rep. 765; Young v. Young, 45 N. J. Eq. 27, 16 Atl. Rep. 921; Everett v. Everett, 71 Iowa, 221, 32 N. W. Rep. 273; Howell v. Jump, 140 Mo. 441, 41 S. W. Rep. 976; Shoemaker v. Walker, 2 S. & R. (Pa.) 554; Miller v. Wilson, 14 Ohio, 108; Lewis v. James, 8 Humph. (Tenn.) 537.

² McRae v. McRae, 78 Md. 270, 27 Atl. Rep. 1038. The correctness of this ruling of the learned Maryland

court seems to be at least doubtful. The husband may be the practical owner of land and yet have only an equitable title. He may be in possession under a valid contract of purchase and have paid all the purchase-money. And if the Maryland court means to hold that the dower right of the wife of the purchaser could be defeated by a conveyance of the legal title by the vendor to a stranger, the author cannot agree with the learned tribunal.

riage and seisin of the husband, then, is not a vested right, and the legislatures may pass laws affecting the same without invading the constitutional inhibition against the destruction of rights which have once become fixed.¹ But where the common-law estate of a one-third interest for life is so enlarged by statute as to make the wife a joint owner with her husband in fee-simple to the extent of one-third of all the lands of which he might be seized during coverture, or other designated part thereof, this is such a vested right in the wife as the legislature cannot take away, any more than the husband could be thus deprived of his two-thirds interest.² Even after the death of the husband the wife's right to dower is not a vested right before assignment, but only a right of action to have the allotment made. It is not an estate in the land itself, and does not even give a right of entry.³

§ 377. When right to, attaches.—As to the land of which the husband was seized at the time of the marriage, the right of the wife to dower therein becomes perfect, subject to the contingency of her survivorship, the instant the marriage is consummated. As to lands which the husband acquires after his marriage and during his coverture, the right of the wife to dower takes effect the very instant the husband becomes the owner of the land.⁴ And the life interest becomes perfect at

¹ *Guerin v. Moore*, 25 Minn. 462, 464; *Baily v. Mason*, 4 Minn. 546, 551; *Morrison v. Rice*, 35 Minn. 436, 29 N. W. Rep. 168; *Hewitt v. Cox*, 55 Ark. 225, 235, 15 S. W. Rep. 1026; *Hatcher v. Buford*, 60 Ark. 169, 29 S. W. Rep. 641; *Smith v. Howell*, 53 Ark. 278, 281, 13 S. W. Rep. 929; *Barbour v. Barbour*, 46 Me. 9; *Noel v. Ewing*, 9 Ind. 37; *Speight v. Read*, 18 Barb. 159; *Kauffman v. Peacock*, 115 Ill. 212, 3 N. E. Rep. 749; *Witthaus v. Schack*, 105 N. Y. 332, 11 N. E. Rep. 649; *Moore v. Mayor*, 8 N. Y. 114; *Bennett v. Harris*, 51 Wis. 251, 8 N. W. Rep. 222; *Taylor v. Sample*, 51 Ind. 423; *Bartlett v. Ball* (Mo.), 43 S. W. Rep. 783; *Leavins v. Sleator*, 2 Greene (Iowa),

604; *Boyd v. Harrison*, 36 Ala. 533; *Randall v. Kreiger*, 23 Wall. 137.

² *Purcell v. Lang*, 97 Iowa, 610, 66 N. W. Rep. 887.

³ *Hoots v. Graham*, 23 Ill. 81; *Reynolds v. McCurry*, 100 Ill. 356; *Walker v. Rand*, 131 Ill. 27, 22 N. E. Rep. 1006; *Heisen v. Heisen* (Ill.), 34 N. E. Rep. 597; *Smith v. Shaw*, 150 Mass. 297, 22 N. E. Rep. 924; *Flynn v. Flynn* (Mass.), 50 N. E. Rep. 650; *State v. Wincroft*, 76 N. C. 38; *Moore v. New York*, 8 N. Y. 110.

⁴ *Tate v. Jay*, 31 Ark. 576; *Gould v. Lockett*, 47 Miss. 96; *Grady v. McCorkle*, 57 Mo. 172; *Sisk v. Smith*, 6 Ill. 503; *Dayton v. Corser*, 51 Minn. 406, 53 N. W. Rep. 717; *Potter v. Worley*, 57 Iowa, 66, 7 N. W. Rep. 657.

once upon the death of the husband.¹ The interest of the widow as to other claimants becomes practically the same as would be the interest of any other person coming to a third ownership for life, though the mode prescribed by law of making the allotment in the two cases is usually different, dower being generally set apart to the dowress under statutes expressly providing the time and manner of making the allotment. It has been held that when the husband has been absent abroad from his wife without having been heard from for the prescribed period of time, usually from five to seven years, according to statute or the common law, as the case may be, when he will be presumed in law to be dead, his wife will then be entitled to dower in his estate.² This, however, is perhaps questionable. The husband might return. His absence does not dissolve the marriage, nor even authorize his wife to contract a subsequent legal marriage if he be in fact alive. And upon his return it would certainly seem that he would have the right to complete dominion over his realty, exclusive of the right of dower or any other like right. Otherwise, the wife might, at the end of an absence of seven years, sell her one-third interest for life to a stranger, who could deprive the husband of his realty to this extent.

§ 378. Ante-nuptial contract — Effect.—When the husband, before marriage, settles upon his wife an adequate amount of property in lieu of her dower interest, in good faith, which is accepted by her, this will usually be binding upon both of the parties. But, in order that such an arrangement be so binding, it is necessary that the property settled upon the intended wife be a reasonable, fair and adequate allowance in lieu of dower. So where, before marriage, a man and wife had an ante-nuptial contract by which she agreed to share in his estate, as her dower right, only one-half of the amount to which she was entitled by law, such an agreement would not preclude nor estop her from asserting her right to a full dower interest.³

¹ *Potter v. Worley*, 57 Iowa, 66, 7 N. W. Rep. 685; *Blair v. Wilson*, 57 Iowa, 177, 10 N. W. Rep. 327; *Potter v. Worley*, 63 Iowa, 66, 10 N. W. Rep. 298; *Summers v. Donnell*, 7 Heisk. (Tenn.) 565.

² *Sherod v. Ewell* (Iowa), 73 N. W. Rep. 493.

³ *Taft v. Taft*, 163 Mass. 467, 40 N. E. Rep. 860.

Nor will a fraudulent marriage settlement be deemed ratified by any acts or declarations of the wife during coverture; and such acts or declarations cannot be proven against the wife after the death of the husband in a contest for her dower.¹ If a husband, before marriage, should settle any realty upon his intended wife which, because of some invalidity in the transaction, should become ineffectual, she will nevertheless be entitled to dower, for when the settlement proves inoperative the husband's title is left effective and this entitles the wife to dower.² The provisions of an ante-nuptial contract not within the statute of frauds, and being regular and valid, may be specifically enforced. Thus, where a husband by the terms of an ante-nuptial contract agreed to give his wife \$500 when he married her and \$50 per month thereafter so long as both should live, it was held that the wife could compel the executors to perform the agreement according to its terms and stipulations.³

§ 379. Ante-nuptial settlement in lieu of.—The husband before marriage may settle property upon his wife in lieu of all her dower rights, and when he does so, the settlement is accepted, and is, moreover, free from fraud or unfairness of any kind on his part, the wife will thereafter be precluded from asserting any dower right in any of his property.⁴ Of course the settlement must be fair and *bona fide*. The parties naturally occupy a confidential relation to each other, and each acceding to the terms of the settlement has the right to assume that neither is attempting to overreach the other. “While they may lawfully contract with each other where there is full knowledge of all that materially affects the contract, yet, where the provision secured for the intended wife

¹ Peaslee v. Peaslee, 147 Mass. 171, 17 N. E. Rep. 506.

² Ward v. Wilson, 1 Desaus. (S. C.) 400.

³ Chaffee v. Chaffee (Vt.), 40 Atl. Rep. 247.

⁴ Bryan v. Bryan, 62 Ark. 79, 34 S. W. Rep. 260; Phelps v. Phelps, 72 Ill. 545; Jordan v. Clark, 81 Ill. 465; McGhee v. McGhee, 91 Ill. 548; McMahon v. McMahon, 105 Ill. 596; Smith's

Appeal, 115 Pa. St. 319, 8 Atl. Rep. 582; Neely's Appeal, 124 Pa. St. 406, 16 Atl. Rep. 883; Spencer v. Boardman, 118 Ill. 553, 9 N. E. Rep. 380; Andrews v. Andrews, 8 Conn. 79; Bart v. Lines, 118 Ill. 374, 7 N. E. Rep. 679; West v. Walker, 77 Wis. 557, 46 N. W. Rep. 819; Hafer v. Hafer, 33 Kan. 449, 6 Pac. Rep. 537; Tiernan v. Binns, 92 Pa. St. 248.

is disproportionate to the means of the intended husband, it raises the presumption of designed concealment, and throws the burden upon those claiming in his right to prove that there was full knowledge on her part of all that materially affected the contract.”¹ Where an ante-nuptial contract, therefore, was made between a man of means and an illiterate woman, whereby she released all her dower right to his estate without any material consideration, and the nature and effect of the settlement was not fully made known or explained to her, such an agreement was properly held not to bar her dower.² And generally, if the provision be grossly inadequate considering the value of the dower right, or if its effect is an imposition upon the property rights of the wife with reference to her dower, she will be permitted to claim the same.³ And in all cases where ante-nuptial marriage settlements are regulated by statute, the local law must be followed, and an attempted settlement in conflict therewith will not be enforced.⁴ But where, after a marriage settlement fixing the property rights of the parties, the marriage is subsequently dissolved by a court of competent jurisdiction, the party at fault cannot claim any property rights by virtue of such settlement after the decree of divorce.⁵

§ 380. Ante-nuptial contract in bar of — Consideration.— The law permits parties who contemplate marriage to make a provision beforehand for a division or management of the property of both or either, which contracts are usually upheld when no fraud or unfairness is practiced. They may contract that neither shall have any estate in the property of the other, whether both or only one has any estate. The marriage is a

¹ Taylor v. Taylor, 144 Ill. 436, 33 N. E. Rep. 532; Bierer's Appeal, 92 Pa. St. 267; Pierce v. Pierce, 71 N. Y. 154; In re Kline's Estate, 64 Pa. St. 122; Tiernan v. Binns, 92 Pa. St. 248; Rockafellow v. Newcomb, 57 Ill. 186; Spurlock v. Brown, 91 Tenn. 241, 18 S. W. Rep. 868; Stilley v. Folger, 14 Ohio, 610, 647; Ludwig's Appeal, 101 Pa. St. 535; Smith's Appeal, 115 Pa. St. 319, 8 Atl. Rep. 582; Kline v. Kline, 57 Pa. St. 120; Tarbell v. Tar-

bell, 10 Allen (Mass.), 278; Darlington's Appeal, 86 Pa. St. 512.

² Hinkle v. Hinkle, 34 W. Va. 142, 11 S. E. Rep. 993.

³ Wright v. Wright, 79 Mich. 527, 44 N. W. Rep. 944; Appeal of Shea, 121 Pa. St. 302, 15 Atl. Rep. 629; Tiernan v. Binns, 92 Pa. St. 248; Pierce v. Pierce, 71 N. Y. 154.

⁴ Fellers v. Fellers (Neb.), 74 N. W. Rep. 1077.

⁵ Jordan v. Clark, 81 Ill. 465.

good and sufficient consideration for the relinquishment by either of all property rights or interest in any property of the other. It is no doubt true that, aside from the marriage contract, a mutual relinquishment of claim by both parties to any of the property of the other would be a sufficient consideration to ground the agreement upon, yet marriage itself is considered in law the very highest consideration; and, with or without any other consideration, is entirely ample to support a contract, whether of marriage settlement or otherwise;¹ though, of course, a property or other valuable consideration would be sufficient. Where the marriage is the moving consideration, and for any reason the same is not consummated because of the fault of one of the parties receiving property by virtue of the settlement, equity will decree a reconveyance, to the end that the party thus parting with property rights may be placed *in statu quo*.²

§ 381. Contracts of husband with reference to realty before marriage — Effect on dower right.— Where a person makes a contract with reference to any of his realty while unmarried, his subsequent marriage cannot have the effect of modifying this agreement in any way, though the dower right of the wife would be in conflict with such previous contract.³ So when, by virtue of a contract for the sale of land, a person becomes entitled to a conveyance, upon the performance of certain conditions, from the vendor and holder of the legal title, the conveyance may be enforced after the marriage of the vendor, and the wife will have no claim for dower; nor for this reason would it be necessary for her to join in the deed by her husband in furtherance of a contract made by him in good faith before marriage.⁴ Of course, the settlement, to be valid and binding, must be free from fraud,⁵ and supported by a valid consideration.⁶

¹ Crostwaight v. Hutchinson, 2 Bibb (Ky.), 407; Mitchel's Adm'r v. Mitchel, 4 B. Mon. (Ky.) 380; Nail v. Maurer, 25 Md. 532, 538; Forwood v. Forwood (Ky.), 5 S. W. Rep. 361; Tiernan v. Binns, 92 Pa. St. 248; Rockafellow v. Newcomb, 57 Ill. 186.

² Rockafellow v. Newcomb, 57 Ill. 186.

³ Beckwith v. Beckwith, 61 Mich. 315, 28 N. W. Rep. 116; Adams v. Hill, 29 N. H. 202; Tiernan v. Binns, 92 Pa. St. 240.

⁴ Hunkins v. Hunkins, 65 N. H. 95, 18 Atl. Rep. 655; Hallett v. Parker (N. H.), 39 Atl. Rep. 583.

⁵ Tiernan v. Binns, 92 Pa. St. 248.

⁶ Tiernan v. Binns, 92 Pa. St. 248.

§ 382. **Property given in lieu of—Rights of widow.**—If the husband give, settle upon, bequeath or otherwise grant to his wife, either before or after marriage, certain property in lieu of dower, the wife will not be entitled to both the property thus designated in lieu of dower and that which would otherwise be her share by virtue of this estate; but she must elect to take one or the other, and when she makes her election regularly she will be bound by it, and cannot thereafter claim any dower interest inconsistent with such election.¹ And if the election be made by the widow with full knowledge of all her rights, and no fraud is practiced upon her, she cannot rescind an election once made.² When the provision is not greater in value than the wife's dower interest, she will be entitled to hold it as against creditors, for she has thus surrendered her dower right, by reason of which it has become available for the payment of the debts of the husband.³ Sometimes statutes prescribe that the widow must make her election within a named time, and when this is required the election must be so made.⁴ And if no time be prescribed within which she shall

¹Crow v. Powers, 19 Ark. 424; Pumphry v. Pumphry, 52 Ark. 193, 12 S. W. Rep. 390; Bolton v. Seigler, 29 Ark. 429; Herbert v. Wren, 7 Cranch, 370; Brown v. Pitney, 39 Ill. 468; Wooley v. Shrader, 116 Ill. 29, 4 N. E. Rep. 658; Severens v. Severens, 68 Iowa, 656, 27 N. W. Rep. 811; Wilcox v. Wilcox, 89 Iowa, 388, 56 N. W. Rep. 517; Potter v. Worley, 68 Iowa, 66, 10 N. W. Rep. 298; In re Mache-mer's Estate, 140 Pa. St. 544, 21 Atl. Rep. 441; Bradford v. Kent, 43 Pa. St. 474; Cox v. Rogers, 77 Pa. St. 160; Fairchild v. Marshall, 42 Minn. 14, 43 N. W. Rep. 563; Estate of Stewart, 74 Cal. 98, 15 Pac. Rep. 445; Corry v. Lamb, 45 Ohio St. 203, 12 N. E. Rep. 660; Snook v. Snook, 43 N. J. Eq. 132, 12 Atl. Rep. 715, Appeal of Kline, 117 Pa. St. 139, 11 Atl. Rep. 866; Goodrum v. Goodrum, 56 Ark. 53, 20 S. W. Rep. 853; Drew v. Drew, 40 N. J. Eq. 458, 1 Atl. Rep. 745; Hurley v. M-Iver, 119 Ind. 53, 21 N. E. Rep. 325; Langley v. Mayhew, 107 Ind. 198, 6

N. E. Rep. 317; Wolfe v. Larison, 163 Ill. 552, 45 N. E. Rep. 112; Spalding v. Hershfield, 15 Mont. 253, 39 Pac. Rep. 88; Payne v. Payne, 119 Mo. 174, 24 S. W. Rep. 781; Chittock v. Chittock (Mich.), 59 N. W. Rep. 655; Jones v. Fleming, 104 N. Y. 418, 10 N. E. Rep. 693; Appeal of Carter, 59 Conn. 576, 22 Atl. Rep. 320; Strayer v. Long, 86 Va. 557, 10 S. E. Rep. 574; Lee v. Tower, 124 N. Y. 370, 26 N. E. Rep. 943.

²Matthews v. Matthews, 141 Mass. 511, 6 N. E. Rep. 776.

³Green v. Saulsbury, 6 Del. Ch. 371, 33 Atl. Rep. 623; Hall v. Hall, 45 S. C. 166, 22 S. E. Rep. 818.

⁴Palmer v. Voorhis, 35 Barb. 479, 482; Bolton v. Sigler, 29 Ark. 418, 429; Laws 9th Assembly Mont., p. 63; Chadwick v. Tatem, 9 Mont. 354, 23 Pac. Rep. 729; Pumphry v. Pumphry, 52 Ark. 193, 12 S. W. Rep. 390; Crow v. Powers, 19 Ark. 424; Turner v. Scheiber, 89 Wis. 1, 61 N. W. Rep. 280; Cowdry v. Hitchcock, 103 Ill. 262.

elect, it would seem, upon principle, that she must elect within a reasonable time. She certainly will not be permitted to have that provided in lieu of dower and the dower right also. And the rights of others in interest, as well as sound principles of law, generally require that she make her election, else she will be precluded from so doing.¹ Three years, with knowledge of all the facts, has been held to be an unreasonable time within which to elect.² Whether or ~~not~~ a devise or provision is meant to be in lieu of dower will depend upon the intention of the person making the provision. This must usually be gathered from the instrument conveying the property, when there is one, and from all the surroundings. And if, thus tested, it be found that the provision was not meant in lieu of dower, the widow will not be put to her election.³ The intent need not be express, but may be implied as well.⁴ Where the husband and wife, during coverture, contract with each other that the wife shall have the use and control of the land of the husband during his life, this will not preclude the wife from the right to take her dower interest in his estate in lieu of a bequest.⁵

§ 383. Post-nuptial settlement in lieu of.— A post-nuptial settlement or conveyance of property to the wife in satisfaction of her relinquishment, in whole or in part, as the case may be, of her dower interest in the lands of her husband, where the property thus given or settled upon her in lieu thereof is accepted by her and no fraud is practiced, will be upheld.⁶

¹ *Griggs v. Veghte*, 47 N. J. Eq. 179, 19 Atl. Rep. 867; *Sandford v. Jackson*, 10 Paige, 266; *Smith v. Kinskern*, 4 Johns. 9; *Reynolds v. Torin*, 1 Russ. (Eng. Ch.) 129; *Chalmers v. Storil*, 2 Ves & B. 224; *Stark v. Hunton*, 1 N. J. Eq. 216; *Stewart v. Stewart*, 31 N. J. Eq. 398; *Brocan v. Brocan*, 41 N. J. Eq. 308, 7 Atl. Rep. 414; *Endicott v. Endicott*, 41 N. J. Eq. 93, 3 Atl. Rep. 157; *Helme v. Strater*, 52 N. J. Eq. 591, 30 Atl. Rep. 333; *Smith's Appeal*, 60 Mich. 136, 27 N. W. Rep. 80; *Van Guilder v. Justice*, 56 Iowa, 669, 10 N. W. Rep. 238; *Snyder v. Miller*, 67 Iowa, 261, 25 N. W. Rep. 240; *Stokes v. Norwood*, 44 S. C. 424, 22 S. E. Rep. 417.

² *In re Machemer's Estate*, 140 Pa. St. 544, 21 Atl. Rep. 441.

³ *Clark v. Griffith*, 4 Iowa, 405; *Estate of Gotzian*, 84 Minn. 159, 24 N. W. Rep. 920; *Rivers v. Gooding* (S. C.), 21 S. E. Rep. 310; *Wright v. Jones*, 105 Ind. 117, 4 N. E. Rep. 281; *Parker v. Hayden*, 84 Iowa, 493, 51 N. W. Rep. 248.

⁴ *Callaham v. Robinson*, 30 S. C. 249, 9 S. E. Rep. 120.

⁵ *McCaulley v. McCaulley*, 7 Houst. (Del.) 102, 30 Atl. Rep. 735.

⁶ *Dakin v. Dakin*, 97 Mich. 284, 56 N. W. Rep. 562; *Woods v. Woods*, 77 Me. 434, 1 Atl. Rep. 193.

There is sound reason in this principle. The husband cannot compel his wife to join in a deed and thereby relinquish her right of dower in the land conveyed, for her contingent dower interest may be of great advantage to her in the future. It may be very necessary or profitable for the husband to sell his land, and the purchaser may require the conveyance of the absolute fee, unhampered by a contingent right of dower or otherwise. Land which is subject to no dower interest is necessarily more valuable than that which is. And it is but fair and right that a husband settle upon his wife other property in consideration that she release her dower.

§ 384. Provision in lieu of — Election — Who may make.—

There are cases occasionally where it is held that the right of another exists to elect for the widow whether she will take a provision in lieu of dower or not. The question is, no doubt, one of some difficulty and embarrassment. The authorities are not harmonious, and known principles are of difficult application. One of these instances is when the widow is insane, and for this reason, not being able to contract or otherwise bind herself or estate by her acts, cannot personally make the election. When this is the case, it seems that she cannot elect by guardian, because the right of election is deemed personal.¹ To obviate this difficulty, perhaps, it is enacted by statute in Missouri that the guardian of an insane widow may elect in her stead.² And where the widow dies before making her election or having a reasonable opportunity to do so, it has been held that a court of equity will make the election for her, having in view, in so doing, her best interests.³ And when the widow is insane, it has been held that a court of equity may exercise the power of making an election for her, to the end that her best interests may be properly protected.⁴ Other courts, constituting, perhaps, the weight of authority, hold, however, that the right of election is personal to the widow, and that if, by reason of death or other disability, the power to

¹ *Heavenridge v. Nelson*, 56 Ind. 90; *Spruance v. Darlington* (Del. Ch.), 38 Atl. Rep. 663.
Pinkerton v. Sargent, 102 Mass. 568; *Wright v. Wright*, 2 Lea (Tenn.), 483, 17 N. W. Rep. 289.
Van Steenwyck v. Washburn, 59 Wis. 483, 17 N. W. Rep. 289.

² *Young v. Boardman*, 97 Mo. 181, 10 S. W. Rep. 48.
³ *Wright v. Wright*, 2 Lea (Tenn.), 483, 17 N. W. Rep. 289.

elect is taken away, her rights with reference to any provision must be the same as though she had no election whatever.¹ It is clear that a court, in attempting to exercise a personal option for a widow, may or may not exercise it as she would herself. The court might think one thing best for her, she another. Her election, if it could be made, would control; but if the courts assume to make it for her, an election might be made which would not be preferable to her, and yet such election would be entitled to the same dignity as one made by herself, if it were valid, were she able to exercise her choice. The person making the provision, no doubt, intends that the widow may take the part allowed her by law if she wishes, or may renounce this, and, in lieu, take that provided. But she is not compelled to make an election. If she fails to do so, the law fixes her rights uniformly in all cases. The courts, in exercising a discretion for her, necessarily would not be uniform in fixing her rights; for one chancellor might think it best for her to take the provision, while another might think it best to renounce this and take under the law. The question of an election, either by the courts or legal representatives or any others acting for the widow, does not seem to be clear in any event, and perhaps the best reasoning as well as the weight of well-considered cases is with the theory that the right of election is personal and can only be exercised by the widow.

§ 385. Provision in lieu of—Election—Right to rescind. The law deals gently with the rights of the wife in exercising her option to take under a will or other provision in lieu of dower, or rely on the legal estate; and in proper cases she will be allowed to rescind an election. When the election is required to be made early, it is but natural that her mind is not in a fully normal state, and she is liable, in deciding, to make a mistake to her prejudice. When the election is required by statute to be made within a certain time, it must generally be

¹ Crozier's Appeal, 90 Pa. St. 384; Carman's Ex'rs, 5 Md. 503; Hinton Sherman v. Newton, 6 Gray (Mass.), 307; Atherton v. Corliss, 101 Mass. 40, 44; Welch v. Anderson, 28 Mo. 293; Jackson's Appeal, 126 Pa. St. 105, 17 Atl. Rep. 535; In re Gunyon's Estate (Wis.), 53 N. W. Rep. 152; Collins v. v. Hinton, 6 Ired. (N. C. Law), 274; Lewis v. Lewis, 7 Ired. (N. C. Law), 72; Fosher v. Guillams, 120 Ind. 172. 22 N. E. Rep. 118; Milliken v. Wel- liver, 37 Ohio St. 460.

made within the time required. But when the widow has made an improvident or prejudicial election, not fully understanding or comprehending her rights, or the effect of her election, and especially when she has been urged by persons having an adverse interest, she will often be allowed to rescind her election, particularly where it would not affect the rights of strangers for her to do so.¹ As was well said by the supreme court of Ohio: "In order that acts of a widow shall be regarded as equivalent to an election to waive dower, it is essential that she act with a full knowledge of all the circumstances, and of her rights, and it must appear that she intended, by her acts, to elect to take the provision. These acts must be plain and unequivocal, and be done with a full knowledge of her rights and the condition of the estate. A mere acquiescence, without a deliberate and intelligent choice, will not be an election."² So, where a widow by mistake elected to take under a supposed will of her late husband, when in fact he died intestate, such erroneous election did not bind her so as to cut off her right of dower.³ And in no case can the widow be compelled to elect; and the failure to elect will be practically a renunciation of the provision.⁴

§ 386. Provision in lieu of—Election—Statutory regulations.—In many of the states statutes provide the manner, time and effect of an election or refusal to take property given or bequeathed in lieu of dower, and when this is the case the statute must be followed. In Indiana the statute provides that when property is bequeathed to the wife she shall make her election whether she will take the provision so made or retain her interest in the lands of her husband fixed by law. This

¹ *Bradfords v. Kents*, 43 Pa. St. 474; 56 Ark. 532, 20 S. W. Rep. 353; *Ward Hindley v. Hindley*, 29 Hun, 318; *Sill v. Sill*, 31 Kan. 248, 1 Pac. Rep. 556; 1012. And see *Beene v. Kimberly*, 72 Wis. 343, 39 N. W. Rep. 542.
² *Milliken v. Welliver*, 37 Ohio St. 460. Cited and approved in *Sill v. Sill*, 31 Kan. 248, 1 Pac. Rep. 556.
³ *Truett v. Funderhurk*, 93 Ga. 686, 20 S. E. Rep. 260.
⁴ *Aldridge v. Aldridge*, 79 Ga. 71, 3 S. E. Rep. 619.

Garn v. Garn, 135 Ind. 687, 35 N. E. Rep. 394; *Cowdry v. Hitchcock*, 103 Ill. 262; *Anderson's Appeal*, 36 Pa. St. 476; *Cox v. Rogers*, 77 Pa. St. 167; *Bierer's Appeal*, 92 Pa. St. 265; *In re Woodburn's Estate*, 138 Pa. St. 606, 21 Atl. Rep. 16; *Evans' Appeal*, 51 Conn. 435; *Hall v. Hall*, 2 McCord (S. C. Eq.), 269, 280; *Goodrum v. Goodrum*,

statute requires the widow to elect whether she would take the provision or rely on her legal right.¹ Later, the statute of this state was so changed as to require the widow within a certain time to renounce the provision made in lieu of dower, else she will be held to have elected to accept the same.² In Wisconsin, as in Indiana, the widow is required to file her election to take under a will in lieu of dower.³ Likewise in Illinois.⁴ And when the election is thus required by statute to be evidenced by a written instrument, whether it be required to be filed or recorded or not, a mere verbal election will not be sufficient.⁵

§ 387. Provision in lieu of—Election—What amounts to. There is no particular form of election required of the widow when she has been given a portion in lieu of dower. Her determination may be indicated in any way that will show that she has elected the one way or the other. Usually any act inconsistent with a purpose to accept the provision in lieu, or *vice versa*, will be sufficient. So where a life estate in certain land was bequeathed to the wife in lieu of her dower and she took possession of that part of the estate thus bequeathed her and enjoyed the uses and profits thereof for a number of years, this was properly held to amount to an election to accept the bequest in lieu of dower.⁶ So, too, where by statute the wife may elect to take one-half of the real estate where the husband dies intestate, a suit by her against the others in interest for a partition of such realty, alleging her ownership of one-half of the lands, is a sufficient election.⁷ And where an adequate provision was made for the wife in lieu of dower by will, which provision she used and enjoyed for sev-

¹ Rev. St. Ind. 1881, § 2505; *Wilson v. Moore*, 86 Ind. 244.

² Rev. St. Ind. 1894, § 266; *Garn v. Garn*, 135 Ind. 687, 35 N. E. Rep. 394; *Burden v. Burden*, 141 Ind. 471, 40 N. E. Rep. 1067; *Wilson v. Wilson*, 145 Ind. 659, 44 N. E. Rep. 665. By Revised Statutes Indiana, 1894, § 2666, the election is required to be in writing over the signature of the widow, and filed and recorded in the office of the clerk where the will is required by law to be recorded. See *Draper*

v. Morris, 137 Ind. 169, 36 N. E. Rep. 714.

³ S. & B. Ann. St. Wis., § 2172; *Ford v. Ford*, 88 Wis. 124, 59 N. W. Rep. 464.

⁴ *Stone v. Vandermark*, 146 Ill. 312, 34 N. E. Rep. 150.

⁵ *Allen v. Hartnett*, 116 Mo. 278, 22 S. W. Rep. 17.

⁶ *Wilson v. Wilson*, 145 Ind. 659, 44 N. E. Rep. 665.

⁷ *Gullett v. Farley*, 164 Ill. 565, 45 N. E. Rep. 972.

eral years with a knowledge of all the facts, it was properly held that she had elected to accept the allowance in lieu of dower.¹ The acts of a widow which necessarily have the effect of an election on her part cannot be shown by her to have been otherwise intended after the lapse of a length of time such as would impose upon her the rule of laches.² The election, of course, need not be express, but may be implied as well, and is equally as effective the one way as the other.³ And if the intention is capable of two constructions, the question will become one of fact.⁴ But a widow who is insane cannot make an election that will bind her.⁵

§ 388. Provision in lieu of—When widow required to elect.— Unless a provision made for a wife is clearly intended to be in lieu of dower, she will not be required to elect whether she will take the provision thus made or accept instead her dower right. The provision, unless meant to be in lieu, does not affect the dower interest, and, if not meant to be in lieu thereof, it would, of course, be absurd for the law to require her to elect whether she will take such a provision or accept only her dower.⁶ But “a wife will be put to her election between a testamentary disposition in her favor and her dower, when it clearly appears from the will that the provision was intended as a substitute for the legal one; and the intention will be implied if the claim of dower would be clearly inconsistent with the will.”⁷ Of course, the intention may be had as well from implication as express declaration,⁸ but the intention to preclude dower need not be expressed in the will. This may be gathered from any facts and circumstances legiti-

¹ *Larkin v. McManus*, 81 Iowa, 723, 45 N. W. Rep. 1061.

² *Bradford v. Kents*, 43 Pa. St. 474.

³ *Gullett v. Farley*, 164 Ill. 566, 45 N. E. Rep. 972; *Craig v. Conover*, 80 Iowa, 355, 45 N. W. Rep. 892.

⁴ *Zimmerman v. Lebo*, 151 Pa. St. 345, 24 Atl. Rep. 1082.

⁵ *Young v. Boardman*, 97 Mo. 181, 10 S. W. Rep. 48. See *Wold v. Berkholtz* (Iowa), 75 N. W. Rep. 329.

⁶ *Strahan v. Sutton*, 3 Ves. Jr. 249; *Fuller v. Yates*, 8 Paige, 325; *Lasher v. Lasher*, 13 Barb. 106; *Young v.*

Pickens, 49 Ind. 23; *Kelly v. Stinson*, 8 Blackf. (Ind.) 387; *Wright v. Jones*, 105 Ind. 17, 4 N. E. Rep. 281; *Carroll v. Carroll*, 20 Tex. 731; *Trowbridge v. Snyder*, 55 Iowa, 352, 7 N. W. Rep. 561; *Bolling v. Bolling*, 88 Va. 524, 14 S. E. Rep. 67; *Sanders v. Wallace* (Ala.), 24 S. Rep. 354.

⁷ *Stewart v. Stewart*, 31 N. J. Eq. 398; *Dougherty v. Dougherty*, 69 Iowa, 677, 29 N. W. Rep. 778.

⁸ *Wright v. Jones*, 105 Ind. 17, 4 N. E. Rep. 281; *Clark v. Griffith*, 4 Iowa, 105.

mately leading to the conclusion.¹ If there be a substantial doubt whether it was the intention that the widow have the provision in lieu of or in addition to dower, the doubt will be resolved in favor of the widow.² But if the provision for the widow, whether it be by bequest or otherwise, is inconsistent or in conflict with, or repugnant to, the dower right, the widow will not be permitted to have both, but will be required to elect.³ And the same rule will apply where the bequest or allowance to the widow is a very large proportion of the whole estate, as, for instance, two-thirds of the income of the personality and one-half the realty for life.⁴ It is held, however, under a statute conferring upon the surviving husband or wife an absolute estate in fee-simple of one-half the realty of the other, where there are no children of the marriage, that a bequest by the husband to his wife of all his lands for life only will not defeat this statutory estate, though made and intended by the husband in lieu thereof.⁵

§ 389. Bequest or provision not in lieu of.—It does not follow that a bequest, gift or other provision made for a wife by the husband is always in lieu of dower. Certainly the husband may give or bequeath to his wife property other than an amount equal to or in lieu of dower, where the rights or interests of third persons are not thereby affected. An allowance is often made to a wife in a will. And when it is clear that this was meant to be in lieu and stead of dower, an acceptance of it, with knowledge of all the facts and circumstances, would prevent a subsequent assertion of the right to dower. But the bequest may or may not be in lieu. It will not be so held, generally, unless it is clear that it was so intended, or unless the assertion of dower would so conflict with the allowance as to be inconsistent or incompatible therewith. Whenever this is the case the provision will not be allowed the wife in

¹ Warren v. Warren, 148 Ill. 641, 36 N. E. Rep. 611.

² Smith v. Kinskern, 4 Johns. 9; Church v. Bull, 2 Denio, 430; Snyder v. Miller, 67 Iowa, 261, 25 N. W. Rep. 240; Clark v. Griffith, 4 Iowa, 405; Bear v. Steahl, 61 Mich. 203, 28 N. W. Rep. 169.

³ In re Gotzian, 34 Minn. 159, 24 N. W. Rep. 920.

⁴ Anthony v. Anthony, 55 Conn. 256, 11 Atl. Rep. 45.

⁵ Sutton v. Read (Ill.), 51 N. E. Rep. 801.

addition to her dower.¹ So, where the husband bequeathed all his real estate to his wife for life, remainder to his heirs, it was held that the provision was not inconsistent with the right of dower, and that she would not be required to elect.² And where a testator bequeathed to his wife a certain sum of money, and left undisposed of the amount of property the widow would be entitled to by virtue of her dower right, it was held that the provision was not inconsistent with the right of dower, and that the acceptance of the allowance by the widow did not preclude her dower right.³ The fact that the testator creates by the will a power or trust with reference to the sale or disposal of his property is not necessarily inconsistent with the right to dower. And where a testator devised all his property to trustees with power of sale, and directions for the payment to the widow of an annuity out of the proceeds, it was held that the provision thus made was not inconsistent with the widow's dower interest, and that she was entitled to both.⁴ The fact that the trustees are required to make sale and application of the proceeds does not alter the rule.⁵ "I take the law to be clearly settled at this day," said the vice-chancellor in *Ellis v. Ellis*,⁶ "that a devise of lands *eo nomine* upon trusts for sale, or a devise of lands *eo nomine* to a devisee beneficially, does not, *per se*, express an intention to devise the lands otherwise than subject to its legal incidents, dower included." In short, unless the provisions of the will are so inconsistent or repugnant that it could not properly be construed that the be-

¹ *Sanford v. Jackson*, 10 Paige, 266; *Havens v. Havens*, 1 Sandf. Ch. 331; *In re Blaney*, 73 Iowa, 113, 34 N. W. Rep. 768; *Clark v. Griffith*, 4 Iowa, 405; *Corriel v. Ham*, 2 Iowa, 551; *Leonard v. Steele*, 4 Barb. 20; *Church v. Bull*, 2 Denio, 430; *Cain v. Cain*, 23 Iowa, 31; *Metteer v. Wiley*, 34 Iowa, 214; *Watrous v. Winn*, 37 Iowa, 72; *Sutherland v. Sutherland* (Iowa), 71 N. W. Rep. 424; *Van Guilder v. Justice*, 56 Iowa, 669, 10 N. W. Rep. 238; *Sully v. Nubergall*, 30 Iowa, 339; *Snyder v. Miller*, 67 Iowa, 261, 25 N. W. Rep. 240; *Daugherty v. Daugherty*, 69 Iowa, 677, 29 N. W. Rep. 778; *Pemberton v. Pemberton*, 29 Mo. 408, 413; *Konvalinka v. Schlagel*, 104 N. Y. 125, 9 N. E. Rep. 868; *Hall v. Smith*, 103 Mo. 289, 15 S. W. Rep. 621; *Payne v. Wilson*, 76 Iowa, 229, 41 N. W. Rep. 45; *Martien v. Norris*, 91 Mo. 465, 3 S. W. Rep. 849.

² *Bare v. Bare*, 91 Iowa, 143, 59 N. W. Rep. 20.

³ *Nelson v. Pomeroy*, 64 Conn. 257, 29 Atl. Rep. 534. And see *Shorr v. Etting*, 124 Mo. 42, 27 S. W. Rep. 395; *Carper v. Crowl*, 149 Ill. 465, 36 S. E. Rep. 1040.

⁴ *Wood v. Wood*, 5 Paige, 596.

⁵ *In re Frazer*, 92 N. Y. 239.

⁶ 3 Hare, 310.

quest was meant in lieu of dower, the presumption is, it was meant in addition thereto.¹ But sometimes it is provided by statute that a provision for the wife in a will shall be a bar to any dower right, and when this is true the law make the election peremptorily.²

§ 390. Sum of money in lieu of.—It may often happen that the dower to which a widow is entitled according to law cannot be allotted to her by metes and bounds with satisfactory precision. When this is the case, the widow may elect to take a sum of money from the estate in lieu of her right of dower, and when she does so, and the money is actually paid her, her dower interest is extinguished.³ This method of awarding dower is usually resorted to when the property out of which the widow is entitled to dower is indivisible without great injury. It has been applied in a case where the husband died seized of a ferry franchise, which in its nature could not be divided so as to set off dower.⁴ Statutes usually provide that, where realty cannot be so divided as to set off an equitable portion to the widow for her dower, the land may be sold, or she may enjoy her one-third of the rents and profits. And the widow cannot be required to take a sum in lieu of dower, when this is the case, unless she so elects.⁵ But if the widow elects to take a certain fund in lieu of dower, the proceeds of which are supposed to be equivalent to the income of her dower right, she must restrict herself to the income of such fund, though the changed condition of things makes it impossible to realize as much interest therefrom as originally expected;⁶ though that which is agreed to be received in lieu of dower must be something valuable and substantial, otherwise there would be no consideration to support the agreement. So, where a husband conveys to his wife certain lands to which he has no title, but

¹ McGowen v. Baldwin, 46 Minn. 477, 49 N. W. Rep. 251; Summerel v. Summerel, 34 S. C. 85, 12 S. E. Rep. 932; In re Hatch's Estate, 62 Vt. 300, 18 Atl. Rep. 814.

² Wall v. Dickens, 66 Miss. 655, 6 S. Rep. 515.

³ Hogg v. Hensley (Ky.), 39 S. W. Rep. 247; Rich v. Rich, 7 Bush (Ky.), 53.

⁴ Stephens' Heirs v. Stephens, 3 Dana (Ky.), 373. And see, to like effect, Rich v. Rich, 7 Bush (Ky.), 55; Taylor v. Lusk, 7 J. J. Marsh. 637, 639.

⁵ Jarrell v. French (W. Va.), 27 S. E. Rep. 263.

⁶ Wolfe v. Larison, 60 Ill. App. 47; affirmed, 163 Ill. 552, 45 N. E. Rep. 112.

expecting to perfect and acquire title, and dies before doing so, the widow will not be thereby precluded from dower.¹

§ 391. Action for, does not survive.—A right of action for dower, or for an injury or damage to the dower estate, must be brought and prosecuted to a judgment in the life-time of the dowress. If this is not done the right fails.² But this idea must be confined to the right of dower itself, or damages unassessed at the time of the death of the widow. Where, by virtue of her dower estate, she becomes entitled to maintain an action for the rents and profits arising therefrom, this is a property right aside from the strict dower estate; is in the nature of a right of recovery upon an implied contract for use and occupation, and the right of action therefor survives to her legal representatives.³ And it seems that any recovery by the legal representatives of the widow by virtue of her dower right must be sought in equity, not at law.⁴ This theory has reference to the common-law estate of dower, where the right is confined to a life interest. So where by statute the widow becomes the owner absolutely of a certain part of the property of the husband, this is a vested and perfected right. The property itself then descends to her heirs, and her legal representatives could maintain an action in tort for the conversion of the same or an injury thereto which took place in her life-time.⁵

§ 392. Right to recover from alienee of husband.—The husband, being unable to convey any greater title than he has, can sell his interest in his land only subject to dower. If the heirs and legal representatives of the husband are required by law, as is usually the case, to allot or assign dower to the widow, the alienee of the husband would be required to do the same thing, and the widow would have her writ of dower against either in the event of a failure or refusal to allot, or have dower set apart according to law, and would be entitled to damages

¹ Hill v. Gray, 45 S. C. 91, 22 S. E. Rep. 802.

² Pollitt v. Kerr, 49 N. J. Eq. 65, 22 Atl. Rep. 800. And see Steiger's Adm'r v. Hilling, 5 Gill & J. 121; Howell v. Newman, 59 Hun, 538, 13 N. Y. S. 648; Turney v. Smith, 14 Ill. 242; Mordant v. Thorold, 1 Salk. 252.

³ Park, Dower, 330; Curtis v. Curtis, 2 Brown Ch. 620; Mordant v. Thorold, 3 Lev. 275; Dormer v. Fortescue, 3 Atk. 130.

⁴ 1 Story, Eq. Jur., § 625.

⁵ Clark v. Bramlett (Ark.), 16 S. W. Rep. 119.

in equity for the mesne profits for the detention from the time of her right to require dower set apart to her.¹ The relief must be had in equity; it cannot be had at law.² The widow may have this relief in equity after she has successfully sued the alienee of her husband at law for dower,³ which she may do when her husband dies seized of the land claimed.⁴ But as the dower estate of the widow is for life only, and, moreover, for her personal benefit, an action for rents and profits cannot be maintained by her legal representatives where she dies before her dower interest has been allotted and set apart.⁵ But where the widow, in her life-time, has instituted suit for the detention of her dower estate before assignment and dies before judgment, equity will usually grant relief to the heirs and decree an accounting for the rents and profits from the time the right of dower accrued to the time the action was begun.⁶

§ 393. Right of, when wife kills husband.— That the wife takes the life of her husband does not, it is held, deprive her of dower in his estate, for he was her husband when he died, no matter by what means he was killed.⁷ This is surely as far as the doctrine should be carried. Indeed, it would seem more proper to hold that the wife is estopped to claim dower in the estate of one whose life she has taken by her own wrongful act and thereby made it impossible for him to survive her. Certainly this should be true when the motive for the killing is to realize dower; and as this motive cannot be easily ascertained, it would probably be best to deny the wife dower in the estate of a man whose life she has culpably and unlawfully taken.

¹ *Stieger's Adm'r v. Hillen*, 5 Gill & J. (Md.) 121; *Sellman v. Bowen*, 8 Gill & J. (Md.) 50; *McClannahan v. Porter*, 10 Mo. 746; *Francis v. Garrard*, 18 Ala. 794; *Todd v. Baylor*, 4 Leigh (Va.), 498; *Roane v. Holmes*, 32 Fla. 295, 13 S. Rep. 339.

² *Sellman v. Bowen*, 8 Gill & J. (Md.) 50.

³ *Sellman v. Bowen*, 8 Gill & J. (Md.) 50; *Dormer v. Fortescue*, 3 Atk. 124, 130.

⁴ *Kiddall v. Trimble, Ex'r*, 1 Md. Ch. 143.

⁵ *Kiddall v. Trimble*, 1 Md. Ch. 143; *Conklin v. Bush*, 8 Pa. St. 514; *Johnson v. Thomas*, 2 Paige, 377; *Turney v. Smith*, 14 Ill. 242; *Stieger's Adm'r v. Hillen*, 5 Gill & J. (Md.) 120.

⁶ 1 Story, Eq. Jur., § 626; *Conklin v. Bush*, 8 Pa. St. 514; *Curtis v. Curtis*, 2 Brown Ch. 620; *Loudon v. Loudon*, 1 Humph. (Tenn.) 1.

⁷ *Owens v. Owens*, 100 N. C. 240, 6 S. E. Rep. 794.

§ 394. **Effect of divorce.**—There could be no dower at common law unless the husband died seized of the property during the life of the wife and during the existence of the marriage. So, the wife could take no dower in lands of which her husband died seized where she had previously been divorced *a vinculo matrimonii*, or *vice versa*, by a court of competent jurisdiction.¹ But this rule does not hold good in jurisdictions where land acquired by the husband and wife during the coverture becomes the joint property of both. In such cases the title is vested in both, jointly and in common, and unless a division of the same according to these rights be made by the decree granting the divorce, they may afterwards sue each other for a partition thereof.² Where the wife sues for and obtains a divorce for the fault of the husband, she does not lose her dower interest in any lands of which the husband was seized during the marriage to the time of granting the divorce.³ This being true, where A. marries B. and obtains a divorce from him for his fault, and B. then marries C., upon the death of B., A. will be entitled to her dower in all the lands of which he was seized during the first marriage to the time of the divorce, just as though B. had never married again. And C. is entitled to dower in the whole of the lands of B. subject to the right of dower in A. If C. should survive A., her dower interest in the whole estate would then become complete.⁴ Where by

¹ 2 Bl. Comm. 130; Wood v. Wood, 59 Ark. 441, 448, 27 S. W. Rep. 641; Clark v. Cark, 6 Watts & S. (Pa.) 85; Barrett v. Failing, 111 U. S. 523, 4 Sup. Ct. Rep. 598; 4 Kent, Comm. 54; Bishop, Mar., Div. & Sep., § 1632; Supreme Council American Legion of Honor v. Smith, 45 N. J. Eq. 466, 17 Atl. Rep. 770; Gleason v. Emerson, 51 N. H. 405; McCraney v. McCraney, 5 Iowa, 232; Hinson v. Bush, 84 Ala. 368, 4 S. Rep. 410; Cody v. Cody (Wis.), 74 N. W. Rep. 217; Wait v. Wait, 4 Barb. 192; Levins v. Sleator, 2 Greene (Iowa), 604; Curtis v. Hobart, 41 Me. 230; Reynolds v. Reynolds, 24 Wend. 192, 196; Boyles v. Latham, 61 Iowa, 174, 16 N. W. Rep. 68; Day v. West, 2 Edw. Ch. 596; 1

Coke, Litt. 32a; Winch v. Bolton (Iowa), 63 N. W. Rep. 330; Fletcher v. Monroe, 145 Ind. 56, 43 N. E. Rep. 1053; Thoms v. King, 95 Tenn. 60, 31 S. W. Rep. 983; Pullen v. Pullen, 53 N. J. Eq. 9, 28 Atl. Rep. 719; Marvin v. Marvin, 59 Iowa, 699, 13 N. W. Rep. 851.

² De Godey v. De Godey, 39 Cal. 157; Whetstone v. Coffey, 48 Tex. 269; Barrett v. Failing, 111 U. S. 523, 4 Sup. Ct. Rep. 598.

³ Scales v. Scales, 65 Mo. App. 292; Rea v. Rea, 63 Mich. 257, 29 N. W. Rep. 703. And see Curtis v. Hobart, 41 Me. 230.

⁴ Stahl v. Stahl, 114 Ill. 375, 2 N. E. Rep. 160.

statute the wife is precluded from her right of dower when the husband is granted a divorce for her fault, it is immaterial where the divorce is decreed. The wife will not have dower in any lands of her husband in the state where the statute is in force.¹ And in a contest for a dower interest by the widow in the lands of her late husband, the law will never presume a divorce in order to defeat the claim.²

§ 395. Divorce granted in foreign jurisdiction.— When the marriage tie is absolutely severed, the parties are not thereafter husband and wife, and, in the nature of things, the wife must be such when the husband dies in order to have dower. Ordinarily it could make no difference in what jurisdiction a divorce is granted, if the proceedings were regular, for then the marriage relation is severed. It is not at all necessary that this be effected within the state where the land is situated.³ An interesting case arose in New York, where a decree of divorce had been rendered in Illinois, by virtue of which the bonds of matrimony were sundered and the wife deprived of dower according to the laws of Illinois, the court of the latter state seeming to have jurisdiction of the parties. The divorce was granted in Illinois for desertion, and served to take away the dower right of the wife. By the laws of New York a divorce is not permitted except for adultery. The case twice went to the court of appeals. The first time it was held that, as it was not shown that the right of dower was cut off according to the laws of Illinois, the widow would still be endowed of lands in New York.⁴ When the case went back, proof was properly introduced to the effect that desertion, which was the ground for divorce upon which the Illinois court acted, deprived her, according to the laws of that state, of the right of dower. Upon the second appeal the court of appeals held, nevertheless, that, as the laws of New York did not authorize a divorce except for adultery, the wife was still endowed of the New York lands.⁵ This conclusion of the New York court of appeals,

¹ *Thoms v. King*, 95 Tenn. 60, 31 S. W. Rep. 983.

² *Cruise v. Billmire*, 69 Iowa, 397, 28 N. W. Rep. 657; *Ellis v. Ellis*, 58 Iowa, 720, 13 N. W. Rep. 65.

³ *Van Cleaf v. Burns*, 62 Hun, 250, 16 N. Y. S. 667.

⁴ *Van Cleaf v. Burns*, 118 N. Y. 549, 23 N. E. Rep. 881. And see *McGill v. Deming*, 44 Ohio St. 645, 11 N. E. Rep. 118.

⁵ *Van Cleaf v. Burns*, 133 N. Y. 540, 30 N. E. Rep. 661.

whose decisions are noted for learning and correctness, seems vulnerable to some criticism. The parties were regularly divorced in Illinois. Certainly they did not have to be divorced in New York in order that the bonds of matrimony might be severed. Any court of any state having jurisdiction of the parties and subject-matter may dissolve the ties of matrimony, and, when this is done, the parties are no longer husband and wife. But according to this New York decision they are husband and wife in that state so far as the dower right of the wife is concerned, and perhaps generally. There is no such thing as parties being married in one state and divorced in another. They are either man and wife everywhere or they are not such anywhere. As was well said by the Kansas court denying a wife dower in Kansas where she had been regularly divorced in Ohio, "the court under the statute of that state had jurisdiction, and the proceedings therein rendered the divorce complete. After the decree of divorce Mrs. Chapman was not legally the wife of John B. Chapman in Ohio or in Kansas,"¹ and the learned New York court should have announced a like conclusion.

§ 396. Effect of a divorce a mensa et thoro.—A divorce from bed and board does not dissolve the marriage relation absolutely nor destroy the right to dower. It only modifies some of the rights and duties of the husband and wife. The wife will be endowed of the lands of her husband of which he was seized of an estate in fee-simple or freehold at any time during the coverture unless she has released her right in due form.² This is true though the divorce *a mensa et thoro* be granted for the adultery of the wife.³ And where the husband and wife separate by mutual consent, dower is not lost.⁴ A void agreement of separation does not destroy the dower right.⁵ Even if the

¹Chapman v. Chapman, 48 Kan. 636, 29 Pac. Rep. 1071.

²Clark v. Clark, 6 Watts & S. (Pa.) 85; Seagrave v. Seagrave, 13 Ves. 443; Gee v. Thompson, 11 La. Ann. 657; Rich v. Rich, 7 Bush (Ky.), 53; Dean v. Richmond, 5 Pick. (Mass.) 461; Watkins v. Watkins, 7 Yerg. (Tenn.) 283; Thayer v. Thayer, 14 Vt. 107; Wait v. Wait, 4 N. Y. 95; Supreme Coun-

cil American Legion of Honor v. Smith, 45 N. J. Eq. 466, 17 Atl. Rep. 770; Saunders v. Saunders (Mo.), 46 S. W. Rep. 428; Day v. West, 2 Edw. Ch. 592.

³2 Bl. Comm. 130.

⁴Thayer v. Thayer, 14 Vt. 107, 123. And see Seagrave v. Seagrave, 13 Ves. 439; Bryan v. Batcheller, 6 R. I. 543.

⁵Walsh v. Kelly, 34 Pa. St. 84.

articles of separation be binding, the wife cannot claim the provision thereby made for her and dower also; but she must make her election which she will take.¹ Filing suit for dower will amount to an election to take by virtue of this right, rather than the agreement.²

§ 397. Improvements—Rights of widow.—Generally speaking, the widow is not entitled to a dower interest in improvements placed upon the property by any other than the husband. If the husband sells his lands to a stranger, which to the extent of his interest he may do, as a general rule, and the stranger then proceeds to place valuable improvements thereon, the widow will be entitled to dower in the lands just as she would have been if the improvements had not been made. The law rather favors improvements, and does not require the purchaser to wait until the husband dies and dower is assigned to the wife before he can go ahead and make his property valuable.³ But this rule does not apply to the heir of the estate. As to him, it is his duty to assign dower to the widow. He cannot neglect this, make improvements, and then say that her right of dower must be governed by the value of the land at the time of the death of the husband. The vendee of the husband, of course, cannot have dower assigned until the husband dies, while the heir, naturally, may do so at once.⁴ The proper proceeding to ascertain the correct allowance of dower in these cases is to deduct from the value of the whole property the improvements made by the purchaser and award the widow dower in the whole value less the value of the improvements.⁵

¹ *Watkins v. Watkins*, 7 Yerg. (Tenn.) 283.

² *Watkins v. Watkins*, 7 Yerg. (Tenn.) 283.

³ *Westcott v. Campbell*, 11 R. I. 378; *Barney v. Frowner*, 9 Ala. (N. S.) 901; *Springle v. Shields*, 17 Ala. 295; *Ware v. Owens*, 42 Ala. 212; *Wood v. Morgan*, 56 Ala. 397; *Chiswell v. Morris*, 14 N. J. Eq. 101; *Van Dorn v. Van Dorn*, Pen. (N. J.) 697; *Powell v. Monson & C. Mfg. Co.*, 3 Mason (U. S. C. C.), 347; *Thompson v. Morrow*, 5 S. & R. (Pa.) 289; *Pierce v. O'Brien*, 39 Fed.

Rep. 402; *Davis v. Hutton*, 127 Ind. 481, 26 N. E. Rep. 187; *Dunseth v. Bank*, 6 Ohio, 34; *Gore v. Brazier*, 3 Mass. 523, 544; *Stearns v. Swift*, 8 Pick. (Mass.) 532; *Hobbs v. Harvey*, 16 Me. 80; *Mosher v. Mosher*, 15 Me. 371; *Campbell v. Murphy*, 2 Jones (N. C. Eq.), 357; *Todd v. Baylor*, 4 Leigh (Va.), 498.

⁴ *Parker v. Parker*, 17 Pick. (Mass.) 236; *Davis v. Walker*, 42 N. H. 482.

⁵ *Rannels v. Washington University*, 96 Mo. 226, 9 S. W. Rep. 567.

But in the absence of allegation and proof of improvements by those entitled to receive a benefit thereby, the assignment will be made regardless of the increased value of the land, as the burden of showing the enhanced value is on those who claim that they have brought about this condition of things.¹ And as the widow's right to dower takes effect at the death of the husband, and her right does not become perfect until then, she will be entitled to dower according to the value at the time of the death of the husband, where the property has been sold in his life-time without her joining, and has enhanced in value since the time of the sale from natural causes, though the increased value by reason of improvements made by the vendees cannot be taken into consideration.²

§ 398. **Right of vendor to recover purchase-money.**—The law usually requires the husband to pay for land which he purchases before the wife will be entitled to dower as against the vendor. It is considered inequitable for the wife to assert this right against a person who owned the land and from whom the husband takes whatever interest he may have. In other words, the equity of the vendor is, and should be, paramount to that of the wife to claim dower.³ The wife has no dower in lands sold to the husband, where the vendor at once takes from the husband his mortgage or deed of trust to secure the payment of the purchase-money, which she could claim against the vendor or any purchaser at a sale under foreclosure of the mortgage.⁴ But in cases of this kind the wife has dower in the lands against all the world, subject to the right of the vendor to proceed against the land to enforce the payment of

¹ Reich v. Burdel, 120 Ill. 499, 11 N. E. Rep. 912.

² Thornburn v. Dosches, 32 Fed. Rep. 810; Thompson v. Morrow, 5 S. & R. (Pa.) 289; Powell v. Manufacturing Co., 3 Mason (U. S. C. C.), 347.

³ Wheatley v. Calhoun, 12 Leigh (Va.), 264; Thorn v. Ingram, 25 Ark. 52; Roush v. Miller, 39 W. Va. 638, 20 S. E. Rep. 668; Birnie v. Main, 29 Ark. 591; Boorum v. Tucker, 51 N. J. Eq. 135, 26 Atl. Rep. 456; Noyes v. Kramer, 54 Iowa, 23, 6 N. W. Rep.

123; Spears v. Evans, 51 Wis. 42, 8 N. W. Rep. 20; Ratcliffe v. Mason, 92 Ky. 190, 17 S. W. Rep. 438; Butler v. Thornburg, 131 Ind. 237, 30 N. E. Rep. 1073; Sheldon v. Hoffnagle, 51 Hun. 478, 4 N. Y. S. 287; Seibert v. Todd, 31 S. C. 206, 9 S. E. Rep. 822; Price v. Hobbs, 47 Md. 359.

⁴ Hurst v. Dubaney, 87 Va. 444, 12 S. E. Rep. 800; Stanley v. Johnson, 113 Ala. 344, 21 S. Rep. 823. And see Glass v. Tisdale, 106 Ala. 581, 19 S. Rep. 70.

the purchase-money. So, no doubt, a sale by a mortgagee of the lands under foreclosure proceedings to realize the purchase-money would vest in the purchaser a title free from dower. But if the debt should become barred so the mortgage could not be enforced,—and the statutes of some states make the lien of the mortgage of no longer duration than the life of the indebtedness thereby secured,—by reason of which the mortgagee should lose his right of foreclosure, it would seem that the dower of the wife would become perfect, subject, of course, to her survival of her husband. The wife has no dower in lands purchased by husband where he pays part of the purchase-money, but fails to pay the remainder, and the vendor then sells the same to realize the balance of unpaid purchase-money.¹

§ 399. Eminent domain.—As a general rule the weight of authority seems to sustain the theory that the widow has no dower interest in lands which have been taken absolutely for a public purpose by virtue of the right of eminent domain. The right to appropriate land to a public use includes the right to appropriate the right of the widow to use her third of it for life; for, were it otherwise, the widow might assert her right, to the material hinderance, and perhaps defeat, of the public use. Instances of this kind are found in the case of condemnation of land for the use of the public as parks, streets, markets, and, in short, all public purposes when authorized by law under the right of eminent domain. When the law is complied with in the condemnation proceedings, the rights of both the husband and wife are permanently extinguished, though the proceedings be had in the life-time of the husband, and, consequently, before the contingent right of dower becomes complete by his death.² But it has been held that a wife is entitled to an equitable portion of the proceeds of lands owned by her husband which have been taken for a public purpose.³ The courts so holding, however, do not seem to be supported by the

¹ *Building, Light & Water Co. v. Fray* (Va.), 32 S. E. Rep. 58. day, 53 N. Y. 298; *Gwynne v. Cincinnati*, 8 Ohio, 24.

² *Duncan v. Terre Haute*, 85 Ind. 104; 2 Dill. Municipal Corp., § 594; *Mills, Eminent Domain*, § 71; *French v. Lord*, 69 Me. 537; *Simar v. Canada*, 53 N. Y. 298; *Gwynne v. Cincinnati*, 8 Ohio, 24. ³ *In re New York and Brooklyn Bridge*, 75 Hun, 558, 27 N. Y. S. 597; *Same*, 89 Hun, 219, 34 N. Y. S. 1002; *Wheeler v. Kirtland*, 27 N. J. Eq. 584.

weight of authority, and have, on the contrary, received very able criticism.¹ It is usually held that, where the right acquired by virtue of this extraordinary power is a mere easement, and not the absolute fee, the widow is not entitled to any dower interest, as she can have no dower in an easement. So it is held that the husband may, without his wife joining in the deed, convey a right of way to a railroad company, and that the easement thus relinquished cannot be interfered with by the wife upon a claim for dower.²

§ 400. Proceeds of realty.—A wife has no dower interest in the proceeds of lands sold by her husband where she has not joined in the deed so as to release her interest. The sale conveys no dower interest when made without her sanction, as a rule, and her dower remains intact. So remaining, this is her right, not an allowance or proportion of the proceeds arising from the sale.³ Therefore where timber is severed from the land it then becomes personalty, and the wife cannot assert a dower interest in the proceeds.⁴ So where a mortgage in which the wife has joined and regularly relinquished her dower right is foreclosed, and a surplus remains after paying the indebtedness secured, the wife will not have the right to require that the court protect such a portion of the proceeds as will equal her dower interest to be vested in her in the event she should survive her husband.⁵ Generally the only way to revive the dower right in such cases is to pay off the mortgage and thus extinguish the incumbrance, which could be done by the husband or wife or some one in privity with either of them.⁶

¹ *Flynn v. Flynn* (Mass.), 50 N. E. Rep. 650.

² *Chouteau v. Missouri Pac. Ry. Co.* (Mo.), 22 S. W. Rep. 458; *Venable v. Wabash Western Ry. Co.*, 112 Mo. 103, 20 S. W. Rep. 493; *Flynn v. Flynn* (Mass.), 50 N. E. Rep. 650; *Mills, Eminent Domain*, § 71.

³ *Tiner v. Christian*, 27 Ark. 306.

⁴ *Hallett v. Hallett*, 8 Ind. App. 305, 34 N. E. Rep. 740.

⁵ *Kauffman v. Peacock*, 115 Ill. 212, 3 N. E. Rep. 749. See, *contra*, *Burrall v. Hurd*, 61 Mich. 408, 28 N. W.

Rep. 731. It would seem, however, that the better rule is as stated in the text and supported by the ruling of the Illinois court. For upon the sale, which is authorized by the mortgage in which the wife releases her dower right, the property securing the debt is transformed into personalty, in which, at common law, the wife could have no dower.

⁶ *Bullard v. Bowers*, 10 N. H. 500; *Hildreth v. Jones*, 13 Mass. 525; *Bolton v. Ballard*, 13 Mass. 226.

§ 401. **Trust estate.**—The wife has no dower in lands the mere naked title to which is held by the husband in any fiduciary or trust capacity. The execution of the trust would vest the whole title in the grantee, whether the wife consented or objected to the sale, whether she joined in the conveyance or not. The husband being only so seized is not seized of an estate of inheritance in contemplation of law, and the wife has no right to assert any claim to dower.¹ So where the husband before marriage has made a parol contract for the sale of land, and put his vendee in possession thereunder, the wife has no dower in lands thus bargained;² that is, none which she could assert to the prejudice of such vendee.

§ 402. **The estate can exist in only one person at a time.**—There can be no such thing as two persons having a dower interest in the same property by virtue of a marriage with the same man at the same time. The law does not recognize two widows to this extent. It is, in short, impossible, under the law, for two to have a dower interest in the same land at the same time, just as much so as it is for two bodies to occupy the same space at the same instant.³ Where a husband, therefore, whose wife had absented herself from him for more than five years next preceding the second marriage, and who was not known nor thought by himself or his second wife to be living, again married, the second wife could take no dower interest in the estate of the husband, though the marriage was contracted by both in the utmost good faith, the first wife being really alive.⁴ This second marriage would be void, and there can be no dower right unless there is a valid marriage to support it. But there are instances where, in a sense, the dower right is recognized in two persons at the same time, though the same dower right cannot exist in two persons except at different times. Thus, “if A. be seized, and has a wife, and sells to

¹ Bailey v. West, 41 Ill. 290; 1 Wash. Real Prop., p. 228; McKneely v. Terry, 61 Ark. 527, 547, 33 S. W. Rep. 953; King v. Bushnell, 121 Ill. 656, 13 N. E. Rep. 245.

² Chapman v. Chapman's Trustees, 92 Va. 537, 24 S. E. Rep. 525; Waller v. Waller, 33 Gratt. (Va.) 83.

³ McCraney v. McCraney, 5 Iowa, 232; Price v. Price, 124 N. Y. 589, 27 N. E. Rep. 383; reversing same case, 33 Hun, 76.

⁴ Price v. Price, 124 N. Y. 589, 27 N. E. Rep. 383.

B., who has a wife, and the husbands then die, leaving their wives surviving, the wife of B. will be dowable of two-thirds in the first instance, and of one-third of the remaining one-third on the death of the widow of A., who, having the elder title in dower, is to be first satisfied of her dower out of the whole farm.”¹ So, where land descends to the husband, subject to the right of dower of the wife of the ancestor, the wife will be entitled to dower only in the lands left after allotment of dower to the wife of the ancestor.² This is true, though dower is not assigned to the wife of the ancestor until after suit therefor by the widow claiming by virtue of her marriage with the heir.³

§ 403. Jointure — The wife has no dower in a jointure.— This is an estate usually held by the husband and wife, but is distinguishable from an estate by entirety. In neither has the wife any dower. In a jointure, the wife does not enjoy the estate until the death of the husband, while in an estate by entirety the estate vests instantly in both husband and wife, and vests in the survivor upon the death of either. A jointure is regulated by statute 27 Henry VIII., chapter 10, known as the statute of uses. The following are the requisites of a good jointure: “It must be for the wife’s life, or for some greater estate. It must be limited to the wife herself, and not to any other person in trust for her. It must be made in satisfaction for the wife’s whole dower, and not of part of it only. The estate limited to the wife must be expressed or averred to be in satisfaction of her whole dower. It must be made before marriage.”⁴ In such an estate it is manifest the wife could have no dower.⁵ There could be no jointure created after the

¹ 4 Kent, Comm. 64. See *In re Criegrier*, 1 Barb. Ch. 598; *Reynolds v. Reynolds*, 5 Paige, 161.

² *Williams v. Williams*, 78 Me. 82, 2 Atl. Rep. 884.

³ *Williams v. Williams*, 78 Me. 82, 2 Atl. Rep. 884.

⁴ *Bouvier’s Law Dict.*, “Jointure;” 2 Bl. Comm. 137.

⁵ 2 Bl. Comm. 138; *Pumphry v. Pumphry*, 52 Ark. 193, 12 S. W. Rep. 390; *Kennedy v. Nedrow*, 1 Dall. 415;

Wentworth v. Wentworth, 69 Me. 247; *Miller v. Goodwin*, 8 Gray (Mass.), 542; *Perry v. Perryman*, 19 Mo. 469; *Tevis’ Ex’rs v. McCreary*, 3 Metc. (Ky.) 151; *Culberson v. Culberson*, 37 Ga. 296; *Grogan v. Garrison*, 27 Ohio St. 50; *Andrews v. Andrews*, 8 Conn. 79; *Vance v. Vance*, 21 Me. 364; *Bryan v. Bryan*, 62 Ark. 79, 84 S. W. Rep. 260. And see *Adams v. Law*, 17 How. (U. S.) 417.

marriage took effect, for then the wife was not capable, by reason of the disability of coverture, of consenting to it. And when made before marriage, the widow had her election whether she would take under the jointure, for then she was free from the disability and could exercise her option, or, if she preferred, she could insist on her right to dower as at common law, renouncing the jointure.¹ A jointure must be in full and complete satisfaction of dower, and must be entered into by the parties with this fact in view.² It is an estate acquired by purchase, for there must be a consideration of some kind.³ It is a vested interest, and is not affected by a decree of divorce dissolving the marriage relation, even though grounded upon the fault of the wife.⁴

§ 404. May be lost by laches.—The law always discourages delay and disapproves of laches in all cases. The widow, therefore, when by the death of her husband or assignment of her dower interest she becomes entitled to dower, may lose the right by unreasonable delay in asserting it, either in applying for allotment of dower, when this is made necessary by statute, or otherwise delaying unreasonably to assert the right in whatever way she may.⁵ This rule is based upon the familiar equitable doctrine that it would be better to put questions respecting real property at rest which could and should have been raised at some distant time in the past. The ravages of time are continually wearing away evidence and obscuring facts and events, as well as taking away by death, removal and otherwise, witnesses whose testimony might be had were the issues brought to a speedy hearing. The law also presumes that if a person has a good cause of action he will be diligent in asserting it, and, to put matters at rest, will, after the lapse of a long period of time, usually about the length of time required for a bar by the statute of limitations, presume a grant from the person making the stale claim. But the courts are reluctant to bar a

¹ 2 Bl. Comm. 138.

² *Pepper v. Thomas*, 85 Ky. 539, 4 S. W. Rep. 297. And see *Kennedy v. Kennedy* (Ind.), 50 N. E. Rep. 756.

³ *Verplank v. Sterry*, 12 Johns. 536; *Campion v. Cotton*, 17 Ves. 267.

⁴ *Richardson v. Richardson*, 75 Me.

570; *Saunders v. Saunders* (Mo.), 46 S. W. Rep. 428.

⁵ *Hill v. Mitchell*, 5 Ark. 608; *Danley v. Danley*, 22 Ark. 263; *Smith v. Wehrle*, 41 W. Va. 270, 23 S. E. Rep. 712.

widow of dower because of her laches where she has neglected to assert her right for a period shorter than that required to defeat the right because of the statute of limitations.¹

§ 405. Relinquishment of—Acknowledgment.—Statutes providing that the wife may relinquish her dower right by joining with her husband in the deed conveying his realty usually require also that she shall acknowledge the same in the manner set forth. When this is true, a failure to comply with the requirements as to the acknowledgment will render the conveyance of no force.² If the wife joins with the husband in the deed and duly acknowledges her relinquishment of dower, this will be sufficient, though no words of relinquishment appear in the instrument itself.³ But, in order that the relinquishment of dower be effectual, it is necessary that the deed of the husband be operative. For, if this be void, the acknowledgment becomes an attempt by the wife alone to dispose of her dower interest, which cannot be effective.⁴ The same is true where the deed is set aside by a court of competent jurisdiction as fraudulent, or is otherwise defeated or rendered inoperative.⁵ In Missouri it is held that the execution of a deed of relinquishment by a married woman during coverture will not divest her of her dower right. But where she executes it during the lifetime of her husband, but does not deliver it to the grantee until the husband dies, the conveyance will be operative, though not acknowledged, as it could not take effect until delivery in any

¹ Mitchell v. Farrish, 69 Md. 285, 14 Atl. Rep. 713.

² Little v. Dodge, 32 Ark. 453; Russell v. Umphlet, 27 Ark. 339; Worsham v. Freeman, 34 Ark. 55; McKenzie v. Sifford (S. C.), 29 S. E. Rep. 338; Stidham v. Matthews, 29 Ark. 650; Northwestern & P. H. Bank v. Ranch (Idaho), 51 Pac. Rep. 764; Chauvin v. Wagner, 18 Mo. 531; Martin v. Dwelly, 6 Wend. 9; Thompson v. Morrow, 5 S. & R. (Pa.) 289.

³ Dutton v. Stuart, 41 Ark. 101.

⁴ Robinson v. Bates, 3 Metc. (Mass.) 40; Stinson v. Sumner, 9 Mass. 143; Blain v. Harrison, 11 Ill. 384; Morton v. Noble, 57 Ill. 176; Smith v. Howell,

53 Ark. 279, 13 S. W. Rep. 720; Ranuels v. Isgrigg, 90 Mo. 19, 12 S. W. Rep. 343; Humes v. Scruggs, 64 Ala. 40; Richardson v. Wyman, 62 Me. 280.

⁵ Malloney v. Horan, 49 N. Y. 111; Robinson v. Bates, 3 Metc. (Mass.) 40; Hinchliffe v. Shea, 103 N. Y. 153, 8 N. E. Rep. 477; Stow v. Stelle, 114 Ill. 382, 2 N. E. Rep. 169; Blain v. Harrison, 11 Ill. 384; Munger v. Perkins, 62 Wis. 499, 22 N. W. Rep. 511; Wilkinson v. Paddock, 125 N. Y. 748, 27 N. E. Rep. 407; Dugan v. Massey, 6 Bush (Ky.), 81; Woodworth v. Paige, 5 Ohio St. 70; Summers v. Babb, 13 Ill. 483; Bohahan v. Combs, 97 Mo. 446, 11 S. W. Rep. 232.

event; and as the grantor is *sui juris* and free from the disability of coverture when the delivery is made, this is held sufficient.¹ If the husband procures the execution of a deed by his wife relinquishing her dower interest, or prevails upon her to acknowledge the same by means of false or fraudulent representations, such relinquishment or acknowledgment would not effect a release of the dower right where the purchaser has notice of the fact.²

§ 406. **How relinquished.**—Under the statutes of most of the American states where the estate by dower has not been taken away or substituted for another, it is usually provided that the wife may relinquish her dower interest in any of the lands of her husband by joining with him in his deed of conveyance, and therein releasing and relinquishing this right. This is usually held to be the only way in which she can alienate or release her contingent dower interest when the statute prescribes this mode of release.³ Of course, it is necessary that the wife be *sui juris*; an infant is not capable of relinquishing her dower so as to bind herself irrevocably.⁴ Where the husband has contracted to convey land, the purchaser, upon the performance of the contract on his part, in an action against the husband and wife for specific performance cannot compel the wife to join with her husband in his deed and thereby relinquish her dower. And this is true though the wife may have executed the contract of sale jointly with the husband, as a contract to convey is not a conveyance, and the wife can only release her dower by joining her husband in the conveyance proper.⁵ Another reason why this ruling is correct is, that a conveyance of or attempt to convey the fee by the wife as a party grantor could not divest the dower, for she has no dower in her own lands and can convey no estate in the lands of her

¹ Saunders v. Blythe, 112 Mo. 1, 20 S. W. Rep. 319. And see, too, the leading case of Zouch v. Parsons, 8 Burr. 1805, so often cited and approved in this country.

² Hatcher v. Day, 53 Iowa, 671, 6 N. W. Rep. 24.

³ Witter v. Biscoe, 13 Ark. 422; Thompson v. McCorkle, 136 Ind. 484, 34 N. E. Rep. 813; Coburn v. Herring-

ton, 114 Ill. 104, 29 N. E. Rep. 478; Farris v. Coleman, 103 Mo. 352, 15 S. W. Rep. 767; Francisco v. Hendricks, 28 Ill. 64; Adler v. Hellman (Neb.), 75 N. W. Rep. 877; Kirk v. Dean, 2 Bin. (Pa.) 341.

⁴ Watson v. Billings, 38 Ark. 278.

⁵ Sloan v. Williams, 137 Ill. 43, 27 N. E. Rep. 531.

husband. She only releases her contingent dower interest, and this must be by apt words in the deed; which is usually required also to be acknowledged by the wife. But it is not necessary, in order that the relinquishment of the dower right by the wife be effective, that any actual consideration be paid her to do so.¹ If there be a consideration sufficient to support the conveyance as to the husband, it will serve a like purpose as to the relinquishment by the wife.

§ 407. Wife cannot convey to her husband.—The wife cannot, as a general rule, convey her dower interest to her husband so as to either vest the right in him or enable him to convey it to another. This is contrary to the policy of the law in reference to the right of dower. It makes it possible, and perhaps easy, in a sense, for the husband to get control of the dower interest, which in many cases would be to the great detriment of the wife, and, no doubt, many times to her entire loss of the estate. Any attempt, therefore, by the wife to convey her dower interest to her husband is regarded in law as a nullity.² Nor can the wife, at common law, deprive herself of her right to dower by a contract with her husband during coverture, binding herself not to claim dower in his property, as they then are incapable of contracting with each other.³ And such an agreement, even when by law the husband and wife are permitted to deal with each other, would not be good as to the wife unless supported by a valuable consideration.

§ 408. Conveyance of—Statute of frauds.—The dower interest which a wife has in the lands of her husband is an interest or estate in realty. It cannot be transferred, assigned, conveyed, released, or in any way disposed of unless in writing.⁴

¹Scanlan v. Scanlan, 33 Ill. App. 202; affirmed, 113 Ill. 630, 25 N. E. Rep. 652. Cram v. Cavana, 36 Barb. 410; Carson v. Murray, 3 Paige, 483.

²House v. Fowle, 22 Oreg. 303, 29 Pac. Rep. 891; Pillow v. Wade, 31 Ark. 678; Shaw v. Russ, 14 Me. 432; Rowe v. Hamilton, 3 Greenl. (Me.) 63; Countz v. Markling, 30 Ark. 17; Rausch v. Rausch, 35 Minn. 291, 28 N. W. Rep. 920; Wightman v. Schliefer, 63 Hun, 633, 18 N. Y. S. 551; ³Carson v. Murray, 3 Paige, 483, 503; Emery v. Neighbour, 7 N. J. Law, 142; Ireland v. Ireland, 43 N. J. Eq. 311.

⁴White v. White, 1 Harr. (Md.) 202; Keeler v. Tatnel, 3 Zabriskie (N. J.), 62; Carnall v. Wilson, 21 Ark. 62; Stull v. Graham, 60 Ark. 461, 31 S. W. Rep. 46; Green v. Groves, 109 Ind. 519, 10 N. E. Rep. 401.

Of course, if there should be a part performance of a verbal contract for the sale of the dower interest, such as would take the transaction out of the statute, the sale thus made would be binding. Such a transfer is governed just as the conveyance of real property generally with reference to the statute of frauds. But the dower estate must have become perfected in the wife at the time of the conveyance; otherwise no kind of a contract would, generally speaking, divest her of her dower interest.

§ 409. Purchaser from husband — Burden of proof.— Where a person purchases land of a husband during the life of the wife, it is incumbent on him, in a contest by the widow for her dower right, to prove that she was not entitled to any dower at the time of his purchase. The law does not require her to prove that she has not waived or otherwise forfeited the interest.¹ The presumption, in the absence of an affirmative showing to the contrary, would be that the wife had not relinquished her right; and, indeed, this presumption would be strengthened by the fact of the absence of her name from the conveyance by the husband, as she is usually required to join in the deed of her husband in order to effectively relinquish her dower right.

§ 410. Assignment of.— Usually the statutes of the several states provide in what manner and form dower may be assigned. Until allotment thereof it is regarded as a mere intangible, inchoate, contingent expectancy, resting in action only. And while it may be released by the wife in the form laid down by law so as to bar her right of asserting it thereafter, it cannot be vested in another separately from the owner of the fee or those in privity with him. For, could this be effected, it would amount to nothing more nor less than a power in the dowress to allot or assign her own dower.² Again, the

¹ Gay v. Lockridge (W. Va.), 27 S. 481, 10 S. Rep. 436; Lowery v. Rowland, 104 Ala. 420, 16 S. Rep. 88; E. Rep. 306.

² Blain v. Harrison, 11 Ill. 386; Weaver v. Rush, 62 Ark. 51, 34 S. W. Rep. 256; Field v. Lang, 87 Me. 441, 33 Hoots v. Graham, 23 Ill. 81; Best v. Atl. Rep. 1004; Mason v. Mason, 140 Jenks, 123 Ill. 447, 15 N. E. Rep. 173; Sell v. McAnaw, 138 Mo. 267, 39 S. W. Mass. 63, 3 N. E. Rep. 19; Jeffries v. Rep. 779; Norton v. Norton, 94 Ala. Allen, 29 S. C. 501, 7 S. E. Rep. 828.

right to have dower assigned is personal, and the widow entitled to an allotment of dower cannot convey or assign this right or interest to another before dower is set apart to her so as to entitle such other to the allotment.¹ Nor, it naturally follows, could she lease such unallotted estate.² And as the widow cannot dispose of or affect her dower right before assignment, creditors cannot reach it by a bill in equity seeking the appropriation thereof to the payment of their debts owing by her.³ Sometimes, however, a conveyance by a widow of her dower interest, even before this is allotted or set apart to her, is upheld in equity.⁴ And though the dower interest before the death of the husband is intangible and inchoate, such interest is sufficient to afford a good consideration in a transaction releasing the right in the manner prescribed by law.⁵ Though

¹ *Jacoway v. McGarrah*, 21 Ark. 347; *Jacks v. Dyer*, 31 Ark. 334; *Parton v. Allison*, 111 N. C. 429, 16 S. E. Rep. 415; *McKee v. Reynolds*, 26 Iowa, 578; *Jenks v. Best*, 123 Ill. 447, 15 N. E. Rep. 173; *Sloniger v. Sloniger*, 161 Ill. 270, 43 N. E. Rep. 1111; *Plummer v. Doughty*, 78 Me. 341, 5 Atl. Rep. 526; *McDonald v. Hannah*, 51 Fed. Rep. 73; *Hart v. Burch*, 130 Ill. 426, 22 N. E. Rep. 831; *Carey v. West*, 139 Mo. 146, 40 S. W. Rep. 661; *Ritt v. Dodge* (R. L.), 37 Atl. Rep. 810; *Barnett v. Meachem*, 62 Ark. 313, 35 S. W. Rep. 533; *Salem Nat. Bank v. White*, 159 Ill. 136, 42 N. E. Rep. 312; *Lawrence v. Zimpleman*, 37 Ark. 648; *Carnall v. Wilson*, 21 Ark. 62; *Mutual Life Ins. Co. v. Shipman*, 50 Hun, 578, 3 N. Y. S. 684; *Moore v. Harris*, 91 Mo. 616, 4 S. W. Rep. 439; *Ritchie v. Putnam*, 13 Wend. 524; *Siglar v. Riper*, 10 Wend. 414.

² *Union Brewing Co. v. Meier*, 163 Ill. 424, 45 N. E. Rep. 264.

³ *Greene v. Keene*, 14 R. L. 388; *Maxon v. Gray*, 14 R. I. 641; *Creswell v. Smith*, 2 Tenn. Ch. 416; *Harper v. Clayton*, 84 Md. 346, 35 Atl. Rep. 1083. Some earlier cases seem to reach a different conclusion, but they will, it is believed, be found to be authorized

by statute or some unsound principle. See *Boltz v. Stoltz*, 41 Ohio St. 540; *Hadden v. Spader*, 20 Johns. 554; *Ager v. Murray*, 105 U. S. 126; *Spader v. Hadden*, 5 Johns. 280; *McDermutt v. Strong*, 4 Johns. 687; *Dundas v. Duttens*, 1 Ves. Jr. 196; *Hamilton v. Mohun*, 1 P. Wms. 122.

⁴ *Weaver v. Rush*, 62 Ark. 51, 34 S. W. Rep. 256. And see *Dobberstein v. Murphy*, 64 Minn. 127, 66 N. W. Rep. 204; *Huston v. Seeley*, 27 Iowa, 183; *Herr v. Herr*, 90 Iowa, 538, 58 N. W. Rep. 897.

⁵ *Wright v. Jones*, 105 Ind. 17, 4 N. E. Rep. 281; *Worley v. Sipe*, 111 Ind. 238, 12 N. E. Rep. 385; *Howlett v. Dilts*, 4 Ind. App. 23, 30 N. E. Rep. 313; *Farwell v. Johnston*, 34 Mich. 342; *Bissell v. Taylor*, 41 Mich. 702, 3 N. W. Rep. 194; *Dakin v. Dakin*, 97 Mich. 284, 56 N. W. Rep. 562; *Saunders v. Blythe*, 112 Mo. 1, 20 S. W. Rep. 319; *Bullard v. Briggs*, 7 Pick. (Mass.) 533; *Holmes v. Winchester*, 133 Mass. 140; *Flynn v. Flynn* (Mass.), 50 N. E. Rep. 650; *Worrell v. Forsyth*, 141 Ill. 22, 30 N. E. Rep. 673; *Gore v. Townsend*, 105 N. C. 228, 11 S. E. Rep. 160; *Mandel v. McClade*, 46 Ohio St. 407, 22 N. E. Rep. 291.

the widow may have the right to occupy the homestead until dower is assigned her, yet she has no right or authority to permanently injure the freehold, as, for instance, by cutting the timber for purposes other than the necessary repairs or improvement of the realty, or for fuel and like purposes. Nor can she license another for or without a consideration to do so.¹ When by statute the widow takes a certain part of the lands of the husband in fee, she may sell this right before assignment. It is practically a tenancy in common with the heirs of the husband to the extent of one-third or whatever other part the law may allow her in fee.² And she may release her dower interest after the death of her husband to the heirs or others in privity with them by deed so as to release the same to them, though she could not, ordinarily, convey her dower interest before assignment. At least it is so held in Minnesota.³ The widow, it is held in New York, may mortgage her unassigned dower.⁴ And when her dower is regularly allotted to her, she then becomes the owner of an estate for life which she is capable of conveying without doubt.⁵

§ 411. **Estoppel.**—The right of the wife to dower in the lands of her husband may be lost by conduct on her part leading others to act, with reference to her rights, to their injury. And, as a general rule, any conduct on her part, or silence when she should speak, whereby others are led to believe that she has no right of dower, or has renounced the same, will not assert it, or, in short, any silence or conduct such as would ordinarily establish an equitable estoppel will deprive her of the right to claim her dower interest to the prejudice of any one so misled.⁶ But the wife is not estopped to assert her dower

¹ Lowery v. Rowland, 104 Ala. 420, 16 S. Rep. 88; Louisville & N. R. R. Co. v. Hill (Ala.), 22 S. Rep. 163; Padelford v. Padelford, 7 Pick. (Mass.) 151; Cook v. Cook, 11 Gray (Mass.), 123; White v. Cutler, 17 Pick. (Mass.) 248; Noyes v. Stone, 163 Mass. 490, 40 N. E. Rep. 856.

² Herr v. Herr, 90 Iowa, 538, 58 N. W. Rep. 897; Ferry v. Burnell, 14 Fed. Rep. 807.

³ Dobberstein v. Murphy, 44 Minn.

526, 47 N. W. Rep. 171. And see, to similar effect, Brandon v. Wilkinson (Ala.), 9 S. Rep. 187; Tucker v. Tucker (Tenn.), 45 S. W. Rep. 344.

⁴ Mutual Life Ins. Co. v. Shipman, 119 N. Y. 324, 24 N. E. Rep. 176.

⁵ Serry v. Curry, 26 Neb. 353, 42 N. W. Rep. 97.

⁶ Holcomb v. School District (Minn.), 69 N. W. Rep. 1067; Anderson v. Woodward (S. C.), 19 S. E. Rep. 685; Ellis v. Diddy, 1 Ind. 561; Lawrence v.

right where she remains silent during coverture, though she knows the grantee of her husband is claiming by virtue of his purchase, where she did not join in the deed, and where she occupies the land and claims ownership thereof.¹ In such a case the purchaser is chargeable with notice of the law giving the wife a dower interest in all the lands of her husband, and that she can only release this before the death of the husband by joining with him in the deed for this purpose. Her right to sue for any interest in land by virtue of her dower is contingent upon her survivorship of her husband, and until the husband dies she has no real vested interest. Of all these things purchasers must take notice at their peril. Where, however, the wife assures the purchaser that she will never claim her right of dower as against him or his privies, and the price is accordingly paid to the wife with the consent of all parties, the wife will be afterwards estopped to claim dower as against them.² But the fact that the wife may know that purchasers from the husband are making valuable improvements during the life of the husband, and does not warn them that she will claim dower, will not estop her, because she has no actually perfected estate.³ And the fact that the widow may accept a small amount under her husband's will for present subsistence or other necessity will not, ordinarily, estop her from repudiating the will and claiming her dower right under the law; and this is especially true when receiving the small allowance is not inconsistent with the will as a whole, nor repugnant to the dower right.⁴ The matter of election is not a rule of law, but one of equity practice, and a knowledge of its requirements is not imputed to all persons as is knowledge of the law.⁵ That the wife knows that another woman is living with her husband claiming, in good faith, to be his wife, and does not make known to such other the fact of her marriage, will not estop her to

Brown, 5 N. Y. 394; Whitacre v. Belt, 25 Oreg. 490, 36 Pac. Rep. 534; Millikin v. Welliver, 37 Ohio St. 460.

¹ Madson v. Madson (Minn.) 71 N. W. Rep. 824.

² Dunlap v. Thomas, 69 Iowa, 358, 28 N. W. Rep. 637.

³ Rockwell v. Rockwell, 81 Mich. 493, 46 N. W. Rep. 8.

⁴ Beem v. Kimberly, 72 Wis. 343, 39 N. W. Rep. 542; Millikin v. Welliver, 37 Ohio St. 460; Sanford v. Sanford, 58 N. Y. 69; Whitridge v. Parkhurst, 20 Md. 62; Spread v. Morgan, 11 H. L. Cas. 588; O'Brien v. Elliott, 15 Me. 125.

⁵ Spread v. Morgan, 11 H. L. Cas. 588.

claim dower as against such stranger.¹ Likewise a wife is not estopped to claim her dower interest in the estate of her husband where he abandons her and lives with another woman, though the wife proper may consent to such illicit relations.² But where the true wife has knowledge that her husband is living in an illicit relation with another woman, claiming her as his wife, and so holding her out to the world, and takes no steps to prevent it or assert her marital rights, and the property of the husband is conveyed to an innocent party who is ignorant of the first and real marriage, the wife will not be permitted to assert any interest in the property of her husband as against such vendee.³

§ 412. **Exchanged lands.**—When the husband exchanges his land for other realty, the wife, at common law, might have her dower in either the lands exchanged or received in exchange. But she could not, in any case, have dower out of both.⁴ Of course, should the wife relinquish her dower right in due form and join with her husband in the conveyance, an act which, at the present day, would usually be effective to pass the dower right when the conveyance is properly acknowledged, the relinquishment of dower would be tantamount to an election to take dower in the lands received in exchange,—at least this would be the legal effect; but if she does not thus join, and the husband appropriates the proceeds of the lands sold to the purchase of other realty, this would not be such an exchange as to divest her dower interest in the land sold, and the wife will be entitled to have her dower against the alienee.⁵

§ 413. **Joint tenancy.**—The wife has no dower estate in the lands of her husband which he owns in joint tenancy with another. The seisin required to make the dower effective is the sole and exclusive seisin and dominion, such as the heirs of the husband might enjoy upon his death by virtue of the laws of inheritance.⁶ Upon the death of the husband his estate de-

¹ *Dunn v. Portsmouth Savings Bank* (Iowa), 72 N. W. Rep. 687.

² *Cazier v. Hinchey* (Mo.), 44 S. W. Rep. 1052.

³ *De France v. Johnson*, 26 Fed. Rep. 891.

⁴ *Co. Litt.* 31b.

⁵ *Cruise v. Billmire*, 69 Iowa, 397, 28 N. W. Rep. 657.

⁶ 1 *Scribner, Dower*, ch. 12, § 33; *Cockrill v. Armstrong*, 31 Ark. 580, 584; 4 *Kent. Comm.* 37; *Babbitt v. Day*, 41 N. J. Eq. 392, 5 *Atl. Rep.* 275.

scends to his heirs. The possibility that the husband may die before the other joint tenant, by reason of which contingency the entire estate would vest in the survivor, is sufficient in law to defeat the right of dower.¹ Another reason is, the alienation by one joint tenant of his interest to the other operates at once not only to sever the jointure, but at the same time, and by the same act, to pass the fee to his grantee—a result which is a necessary incident of this species of land tenure.²

§ 414. Lands held by husband in common.—While the widow will not be endowed at common law of lands held by the husband in joint tenancy, yet she has dower in the realty which her husband holds as a tenant in common with others.³ This is true though the other tenant be the wife, and she will be entitled to dower out of that part of the land set apart in partition to the heirs as the ancestor's estate.⁴ Of course, in cases of tenancies in common, the wife would not have dower in the whole realty, for the other tenant may be also married, and his wife would have the right to as much dower as the other if the interests of the husbands were equal. The wife, therefore, has a dower interest in lands thus held by her husband with another, to the extent only of a third of his portion, whatever this may be, according to the circumstances.

§ 415. Partnership property.—Generally, the widow has no right to dower in any of the lands of her deceased husband where the same are held by him with others as partnership assets. At least, she can claim no dower in such lands until the business of the partnership is wound up. The right of the creditors to resort to all the property owned by the partners as partnership property is paramount to the claim of the widow to dower.⁵ But the mere fact that two persons jointly buy

¹ 4 Kent, Comm. 37; 2 Bl. Comm. 183, 184.

² Cockrill v. Armstrong, 31 Ark. 580.

³ Harvill v. Holloway, 24 Ark. 19; Drewry v. Montgomery, 28 Ark. 256; Wheatley's Heirs v. Calhoun, 12 Leigh (Va.), 264.

⁴ Dehoney v. Bell (Ky.), 30 S. W. Rep. 400.

⁵ Riddell v. Riddell, 85 Hun, 482, 33 N. Y. S. 99; Holton v. Guinn, 65 Fed. Rep. 450; Drewry v. Montgomery, 28 Ark. 256; Sparger v. Moore, 117 N. C. 449, 23 S. E. Rep. 359; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. Rep. 1010; Sherley v Thomas-

land, under an agreement that each shall share equally in the losses and profits arising from the same, will not make them partners as to the land, nor the land partnership property, so as to bar dower in the wife of either of the owners.¹ Where a company of persons went into a speculative enterprise for the purpose of buying and selling lands for profit, and by the terms of the contract all lands were to be conveyed to a trustee, who was empowered to sell, the parties in interest to share in any profits or losses according to their ownership, and no provision was made for any division of the lands at the winding up of the business, it was held that such realty was partnership property and that the wife of a member had no dower.² The true rule as to the status of partnership realty, however, is this: All the partnership property, including real estate owned by the partners as firm property, is regarded, in equity at least, as a kind of trust fund to which the creditors have a paramount right to resort for the purpose of realizing their claims against the firm. This right takes precedence over the right to dower; and if it be necessary to resort to the land in order to realize a debt owing by the firm, and the same is sold by due process of law for this purpose, the right of dower is extinguished in whole or in part, as it may be necessary to sell the whole or only a part of the firm realty in order to realize the firm debt.³

son's Ex'r (Ky.), 1 S. W. Rep. 530; Clay v. Freeman, 118 U. S. 97, 6 Sup. Ct. Rep. 964; Dawson v. Parsons, 10 Misc. Rep. 428, 31 N. Y. S. 78; Deering v. Kerfoot's Ex'r (Va.), 16 S. E. Rep. 670; In re Ransom, 17 Fed. Rep. 331; Parrish v. Parrish, 88 Va. 529, 14 S. E. Rep. 325; Paige v. Paige, 71 Iowa, 318, 32 N. W. Rep. 360; Johnson v. Gordon (S. C.), 30 S. E. Rep. 507.

¹Shipp v. Snyder, 121 Mo. 155, 25 S. W. Rep. 900. And see Hughes v. Allen, 66 Vt. 95, 28 Atl. Rep. 82.

²Mallory v. Russell, 71 Iowa, 63, 32 N. W. Rep. 102; Way v. Stebbins, 47 Mich. 296, 11 N. W. Rep. 166; Bergeron v. Richardott, 55 Wis. 129, 12 N. W. Rep. 384; Foster's Appeal, 74 Pa. St. 391.

³Rovelsky v. Brown, 92 Ala. 522, 9 S. Rep. 182; Lenow v. Fones, 48 Ark. 557, 4 S. W. Rep. 56; Holmes v. McGhee, 27 Mo. 598; Young v. Thrasher, 115 Mo. 222, 21 S. W. Rep. 1104; In re Coddling & Russell, 9 Fed. Rep. 849; Loubat v. Norris, 5 Fla. 350, 363; Logan v. Greenlaw, 25 Fed. Rep. 299; Buchan v. Sumust, 2 Barb. Ch. 165. 199; Wilcox v. Wilcox, 13 Allen (Mass.), 252, 254; Shearer v. Shearer, 98 Mass. 107; Uhlee v. Semple, 20 N. J. Eq. 294; Dilworth v. Mayfield, 36 Mass. 52; Scruggs v. Blair, 44 Miss. 406; Tillinghurst v. Chaplin, 4 R. I. 173; Campbell v. Campbell, 30 N. J. Eq. 415; Simpson v. Leach, 86 Ill. 286; Free v. Beatley, 95 Mich. 426, 54 N. W. Rep. 910.

§ 416. Conveyance by husband in contemplation of marriage.—Where a husband before marriage and in contemplation thereof conveys his property in order to defeat the dower estate of his future wife, the transfer will be void as to the wife as well as to third parties with notice of the purpose of the conveyance. This would be a fraud upon the rights of the wife, an unconscionable attempt to deprive her of a merited estate, and the courts will not tolerate nor lend their sanction to such a fraudulent and unjust purpose.¹ Upon this principle it is held very properly that where a husband, just before or in contemplation of death, conveys all his realty to his children, reserving the use and control thereof to himself during his life, it is a fraud on the dower right of the wife and will not operate to defeat same.² But a conveyance of a reasonable advancement by the father to his children is no fraud upon the marital rights of a future wife;³ for this is a lawful and proper act towards the children, as the parent owes them the duty to support and care for them.

§ 417. Rights of creditors of husband.—The dower estate of the wife is paramount to the rights of creditors of the husband, and this they cannot reach by execution or other process in order to realize their claim against the husband. The husband can no more affect the estate of the wife by contracting debts than he could by a direct conveyance of the property.⁴ And as the dower interest of the wife cannot be defeated by a sale of the land by the husband alone, or a sale under an execution against him at the instance of his creditors, so it cannot be cut off by a sale of the lands of the husband after his death under order of a court of probate or other court having jurisdiction in such

¹ *Swaine v. Perring*, 5 Johns. 482; *Youngs v. Carter*, 10 Hun, 194; *Kelly v. McGrath*, 70 Ala. 75; *Lake v. Nolan*, 81 Mich. 112, 45 N. W. Rep. 376; *Jones v. Jones*, 64 Wis. 301, 25 N. W. Rep. 218; *Tiedeman, Real Property*, § 126; *Petty v. Petty*, 4 B. Mon. (Ky.) 215, 219; *Stroup v. Stroup*, 140 Ind. 179, 39 N. E. Rep. 864; *Brooks v. McMeekin*, 37 S. C. 285, 15 S. E. Rep. 1019.

similar facts in *Petty v. Petty*, 4 B. Mon. (Ky.) 215. And see *Murray v. Murray*, 115 Cal. 256, 47 Pac. Rep. 37.

² *Thayer v. Thayer*, 14 Vt. 107. A similar conclusion was reached under

³ *Goodman v. Malcom*, 5 Kan. App. 285, 48 Pac. Rep. 439.

⁴ *Crow v. Powers*, 19 Ark. 424, 440; *Menifee's Adm'r v. Menifee*, 8 Ark. 9; *Hewitt v. Cox*, 55 Ark. 225, 238, 15 S. W. Rep. 1026, and 17 S. W. Rep. 873; *Hill v. Mitchell*, 5 Ark. 608; *Tate v. Jay*, 31 Ark. 576.

cases, for the purpose of paying the debts of the husband proven against his estate.¹ This rule also applies to contracts or debts whereby a mechanic's lien is effected. The husband cannot, by contract or otherwise, charge the land with a mechanic's or other lien so as to cut off the right of dower upon a foreclosure thereunder.² And as her dower interest is not affected by the mechanic's lien, she is not a proper party to a proceeding to foreclose the same.³

§ 418. **An estate favored by the courts.**—As the estate of dower is allowed in order to give the wife a competency, after the death of her husband, during life, it is always regarded with favor by the courts. Its purposes are in a sense analogous to the exemption laws which set apart certain property to the head of the family, which is deemed sacred from invasion by creditors or others, to the end that starvation or want may be averted and the family reared to advantage. The estate by dower, too, being for a like purpose, is for this reason favorably considered and freely sustained and upheld. "It is a legal, an equitable and a moral right, not only highly favored in law, but next to life and liberty held sacred."⁴

§ 419. **Merger.**—When the wife succeeds in any way to a greater estate in the lands of her husband than that of dower, as, for instance, where she becomes purchaser and owner of the land, the dower estate becomes merged in the greater and ceases to exist. Instances of this kind are found where the wife buys land from a stranger to whom her husband has previously conveyed it without her joining in the conveyance to release her dower.⁵ This goes upon the principle that "when a greater and less estate meet in the same person without any intermediate estate, the less estate is merged in the greater, or, to use the language of the old law, is 'drowned' and ceases to

¹ Goodman v. Moore, 22 Ark. 191; 103; Crittenden v. Woodruff, 11 Ark. Livingston v. Cochran, 83 Ark. 294; 84, 90; Lucas v. Sawyer, 17 Iowa, 517; Whittaker v. Belt, 25 Oreg. 490, 36 Purcell v. Lang, 97 Iowa, 610, 66 N. Pac. Rep. 534. W. Rep. 887; Bishop v. Boyle, 9 Ind.

² Bishop v. Boyle, 9 Ind. 169; Shaeffer v. Weed, 3 Gilm. (Ill.) 511. 169; Butler v. Fitzgerald, 48 Neb. 192, 61 N. W. Rep. 640; Bolton v. Ballard,

³ Shaeffer v. Weed, 3 Gilm. (Ill.) 511. 13 Mass. 226, 229.

⁴ Kennedy v. Nedrow, 1 Dall. 415; ⁵ Youmans v. Wagener, 30 S. C. 302, Crittenden v. Johnson, 11 Ark. 94, 9 S. E. Rep. 106.

exist.”¹ And further, there can be no practical necessity for a person to claim an interest in land inferior to the fee when the absolute fee is owned by him.

§ 420. Partition.—When the husband holds in common with others, it necessarily follows that his wife has a dower interest only in the lands which belong to him. Any of the parties who are tenants in common, upon familiar principles, have the right at any time to resort to the courts for partition of the land where a division cannot be agreed upon, and the wife, by virtue of her dower interest in that part of the lands to which her husband is entitled, has no right to interpose any objection to the partition proceedings, for this is but a judicial determination of what lands belong to her husband and, incidentally, of what lands she shall be endowed.² Nor is the wife a necessary party to the partition proceedings. She owns none of the land and has no title thereto.³ If the parties agree upon and effect a voluntary partition, or if an involuntary division is forced by the courts at the suit of any of the parties, the wife takes dower in that part set apart to her husband and none other.⁴ If, in partition proceedings, the lands are sold because an equitable division cannot be made, the wife loses her contingent dower right.⁵

§ 421. Mortgaged lands.—Where the wife has joined in a deed of trust or mortgage by her husband of the lands in which she is entitled to dower, the rule is she will be entitled to this estate out of these lands, subject only to the rights of the mortgagee. This is usually held to be an equitable proportion of the mortgage debt, which the widow must pay in order to have her dower interest in such lands. But this proportion is not one-third of the mortgage indebtedness; for the widow is not

¹ 2 Rap. & L. Law Dict. 815; Mangum v. Piester, 16 S. C. 316.

² Motley v. Blake, 12 Mass. 280; Ward v. Gardner, 112 Mass. 42.

³ Haggerty v. Wagner, 148 Ind. 625, 48 N. E. Rep. 366; Lee v. Lindell, 22 Mo. 282; Flynn v. Flynn (Mass.), 50 N. E. Rep. 650; Holley v. Glover, 36 S. C. 404, 15 S. E. Rep. 695. This last case will be found very interesting

and instructive. See *contra*, however, Wilkinson v. Parish, 3 Paige, 653, and see Jackson v. Edwards, 7 Paige, 386.

⁴ Holley v. Glover, 36 S. C. 404, 15 S. E. Rep. 605; Kunselman v. Stine, 183 Pa. St. 1, 38 Atl. Rep. 414.

⁵ Weaver v. Gregg, 6 Ohio St. 547; Haggerty v. Wagner, 148 Ind. 625, 48 N. E. Rep. 366.

endowed in fee of one-third of the lands, but only a life estate in one-third thereof. She is therefore chargeable only with such an amount as the gross value of her dower interest bears to the whole mortgage indebtedness, and no more.¹ Where land of a decedent was assigned to the widow, and such land was worth, exclusive of a mortgage on it, one-third of all the estate of the husband out of which the widow was entitled to dower, it was held that she would be required to pay a third of the interest on the whole mortgage debt.² This is because the widow in such cases is a life tenant by virtue of her dower estate, and the rule of equity is, the life tenant must keep down the incumbrances as a condition of his enjoyment of the estate. The benefits received by reason of the rents and profits are presumed to be a fully adequate compensation for the burden thus imposed.³ If the mortgagee should, instead of foreclosing the mortgage, proceed to judgment on the debt and sue out an execution and sell the land, the purchaser at execution sale would take the land subject to dower.⁴

§ 422. Mortgage — Right of widow where she joins in mortgage.—Where the husband has a complete title to land, and executes a mortgage or deed of trust thereon, in which the wife regularly joins for the purpose of relinquishing her dower interest, a sale of the property upon default, and in accordance with the terms of the stipulations, carries with it the right of the wife to dower in the lands as effectively as though the husband had conveyed absolutely to the purchaser under the mortgage foreclosure in the first place, and the wife had properly joined in the instrument for the purpose of relinquishing her dower.⁵ But unless the wife so joins in the mortgage as

¹ 2 Scribner, Dower, 696; *Fowle v. House*, 29 Oreg. 114, 44 Pac. Rep. 692; *Swain v. Perrine*, 5 Johns. 482; *Hodges v. Phinney*, 106 Mich. 537, 64 N. W. Rep. 477; *Shope v. Schaffner*, 140 Ill. 470, 30 N. E. Rep. 872; *Bell v. Mayor*, 10 Paige, 49; *Gibson v. Crehore*, 5 Pick. (Mass.) 146; *Sheafe v. Oneil*, 9 Mass. 9; *McMahon v. Russell*, 17 Fla. 698. And see *Overton v. Hinton* (N. C.), 31 S. E. Rep. 285.

² *Hodges v. Phinney*, 106 Mich. 537, 64 N. W. Rep. 477.

³ *Hunt v. Watkins*, 1 Humph. (Tenn.) 498; *Penhyrn v. Hughes*, 5 Ves. 99; *House v. House*, 10 Paige, 158; *Casborne v. Scarfe*, 1 Atk. 603; *Hodges v. Phinney*, 106 Mich. 537, 64 N. W. Rep. 477; *Foster v. Hillard* (U. S. C. C.), 1 Sto. 77; 4 Kent, Comm. 74.

⁴ *Barker v. Parker*, 17 Mass. 563.

⁵ *Miller v. Farmers' Bank*, 49 S. C. 427, 27 S. E. Rep. 514; *Shope v. Schaffner*, 140 Ill. 470, 20 N. E. Rep. 872; *Fifth Nat. Bank v. Pierce* (Mich.), 75

to cut off her right to dower by virtue of such joining, she will not be deprived of her dower, even though she be made a party to the foreclosure proceedings.¹ A wife in possession of land mortgaged by her husband before the marriage has such an interest therein, by reason of her dower right, as will entitle her to redeem from the mortgage; for, to all the world except the mortgagee and his privies, her dower interest remains intact.² This is true, though she may have properly relinquished her dower right in executing the mortgage with her husband.³ She must redeem, however, before the equity of redemption is barred.⁴ Where the wife has joined in the conveyance properly, so as to cut off her dower, it seems that it is not absolutely necessary to make her a party to an action of foreclosure, though to do so would be the safer practice.⁵ But if the mortgage should be paid or otherwise defeated, the wife will again become invested with her dower right just as though she had never joined in the mortgage.⁶ This is true, though the incumbrance be paid by a stranger, for payment is a satisfaction, and the dower right thereupon becomes precisely the same as though there had never been an incumbrance.⁷

§ 423. Conflict of laws — Real property.— While the right of dower in personal property is usually conceded to be governed by the laws of the domicile of the husband at the time of his death, because personal property is supposed to have status and to follow by a fiction the domicile of the owner, yet

N. W. Rep. 1058; *Brown v. Lapham*, 3 Cush. (Mass.) 551; *Pyles v. Williams* (Tenn. Ch. App.), 39 S. W. Rep. 232; *Carl v. Butman*, 7 Greenl. (Me.) 102; *Bird v. Gardner*, 10 Mass. 364.

¹ *Davis v. Townsend*, 32 S. C. 112, 10 S. E. Rep. 837; *Wedge v. Moore*, 6 Cush. (Mass.) 8.

² *Mersellis v. Van Riper* (N. J. Eq.), 38 Atl. Rep. 196; *Denton v. Nanny*, 8 Barb. 618; *Cass v. Martin*, 6 N. H. 25; *Davis v. Wetherell*, 13 Allen (Mass.), 60; *Savage v. Hall*, 12 Gray (Mass.), 363; *Eaton v. Simonds*, 14 Pick. (Mass.) 98.

³ *Simonton v. Gray*, 34 Me. 50; *Davis v. Wetherell*, 13 Allen (Mass.), 60.

⁴ *Farwell v. Cotting*, 8 Allen (Mass.), 211.

⁵ *Denton v. Nanny*, 8 Barb. 618. See *Bell v. Mayor*, 10 Paige, 49, and *Pitts v. Aldrich*, 11 Allen (Mass.), 39; *Davis v. Wetherell*, 13 Allen (Mass.), 60, where it is held, under the Massachusetts statute, that it is not necessary to join the wife in a foreclosure proceeding where she has joined with her husband and relinquished her dower right in due form.

⁶ *Wedge v. Moore*, 6 Cush. (Mass.) 8.

⁷ *James v. Upton* (Va.), 31 S. E. Rep. 255.

such is not the case with realty. Dower rights, rights of descent, and the mode of acquiring and disposing of realty are all governed by the laws of the state or country where the land is located, no matter where the owner or his wife may be at the time of the death of the husband.¹ In other words, one state cannot impose upon another any rule of law or policy in respect to dower or any other estate in lands situated within other states. It is essential to the uniform administration of the laws concerning real property that every state be permitted to prescribe the rules of succession, descent, dower, curtesy, etc., as well as the manner, form and requisites of conveyances and the acquisition of realty. It is held, therefore, that the right of a widow to renounce a provision in the will of her husband as to his realty must be governed by the laws of the state where the land is located.²

§ 424. What law governs right of.—The right of a widow to dower out of the estate of her deceased husband must receive vitality from the law in force at the time of the death of the husband, not that before or since.³ But it is not necessary that the marriage be contracted in the state where the land is. The only inquiry necessary in this respect is, Has there been a valid marriage, and is it still effective? If this be answered in the affirmative, the dower right will be as effective, where the parties have been married in a foreign state or country, as though this had taken place in the jurisdiction where the property is situated.⁴

§ 425. Personalty — Conflict of laws.—Where the widow is entitled to dower in personalty of her husband, this right to

¹ *Jones v. Gerock*, 6 Jones (N. C. Eq.), 190; *McCormick v. Sullivant*, 10 Wheat. 192, 202; *Garland v. Rowan*, 2 Sm. & M. (Miss.) 617; *France v. Connor*, 161 U. S. 65, 16 Sup. Ct. Rep. 497; *Story, Confl. Laws*, §§ 448, 454; *Bolton v. Sigler*, 29 Ark. 418, 427; *Duncan v. Dick*, *Walker* (Miss.), 288; *France v. Connor*, 3 Wyo. 445, 29 Pac. Rep. 569; *McGill v. Deming*, 44 Ohio St. 645, 11 N. E. Rep. 118; *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460.

² *Apperson v. Bolton*, 29 Ark. 418.

³ *Hatcher v. Buford*, 60 Ark. 169,

180, 29 S. W. Rep. 641; *Carey v. West*, 139 Mo. 146, 40 S. W. Rep. 661; *Crowley v. Mellon*, 52 Ark. 1, 11 S. W. Rep. 876; *Felch v. Finch*, 52 Iowa, 563, 3 N. W. Rep. 570; *Pierce v. O'Brien*, 29 Fed. Rep. 402; *Ware v. Owens*, 42 Ala. 212; *Bennett v. Harris*, 5 Wis. 251, 8 N. W. Rep. 222; *Parker v. Small*, 55 Iowa, 732, 8 N. W. Rep. 662; *Cunningham v. Welde*, 56 Iowa, 369, 9 N. W. Rep. 304; *Boyd v. Harrison*, 36 Ala. 533.

⁴ *Smith v. Smith*, 52 N. J. Law, 207, 19 Atl. Rep. 1143.

assert dower in such property must be governed by the laws of the place where the husband's domicile was at the time of his death. If therefore the widow is entitled to dower in personalty by the laws of the state or place of domicile of the husband at the time of his death, the right can be enforced wherever the property is situated. If the right is not recognized by such laws of the domicile, her right to dower in the personalty will be denied, and it will be subject to the debts of the husband or other claims the same as though there were no law allowing dower in personalty.¹ The theory upon which this principle rests is, "it is considered that movables have no *situs*, but accompany the person of the owner; so that by a legal fiction they are always deemed to be in the place of his domicile. And the rights of the widow, of heirs and distributees, are determinable by the intestate laws of the country where the deceased was domiciled."² But this is only the common law. The rule does not interfere with the right of every state to fix the status of personal property, the dower or other like interest therein, when, how and to what extent it shall attach, and how it may be enforced. So, when the dower right in personalty within any state is prescribed by the laws of that state, the common-law rule must yield to the statute where the latter does not operate to take away any constitutional right.³

§ 426. **Homestead.**—It is frequently the case that a widow in this country is given a right of homestead in the lands of her husband, upon his death, which she is entitled to hold for the term of her natural life. Nor does this provision for the widow necessarily conflict with her right of dower. If all the lands of which the husband died seized do not amount to more than the amount the law allows the widow for a homestead, she could hold the whole of such realty by virtue of her right of homestead. And, while she would be entitled to dower in the estate, yet she has this in occupying or claiming the homestead, when the homestead area is no greater than the amount

¹ Wharton, Conf. Laws, §§ 189, 193; *Burtwhistle v. Vardill*, 5 Barn. & Cr. 351; *Sill v. Worswick*, 1 H. Bl. 690; *Hewitt v. Cox*, 55 Ark. 225, 15 S. W. Rep. 1026; *Clark v. Holt*, 16 Ark. 275; *Story*, Conf. Laws, § 380.

Cameron v. Watson, 40 Miss. 191. ³ *Story*, Conf. Laws, §§ 383, 390;

² *Gibson v. Dowell*, 42 Ark. 164, 166; *Clark v. Holt*, 16 Ark. 257, 264.

of land out of which the widow would be entitled to dower. And as both the dower and homestead right are favored in law, it is held that the fact that the widow is entitled to the homestead does not cut off any part of her dower right.¹ And when a widow selects or retains her homestead, as the law allows her to do, she is, in addition thereto, entitled to such a part of the real estate other than the homestead as would amount to an equitable one-third of all the lands, including the homestead.²

§ 427. Duty of wife to pay taxes.—The law does not require the wife, in the life-time of her husband, to pay taxes on his land, or that part to which she would be entitled as her dower, as a condition precedent to the enjoyment of this estate by her after the death of the husband. This is the case whether the lands be held by her husband himself or by his vendees or assigns, where she has not relinquished her right.³ Nor, of course, this being true, could the widow be required to pay back any taxes which the husband or stranger in privity with him may have paid on the lands to protect them from sale by the state in satisfaction of its claim for taxes,⁴ though it is the legal duty of the widow to bear whatever proportion of the taxes her estate bears to the whole after the death of the husband, so long as her dower right continues.⁵ But the taxes assessed for the purpose of making needed public improvements stand on a different footing. The rule in regard

¹ *Monk v. Capen*, 5 Allen (Mass.), 146; *Cowdry v. Cowdry*, 131 Mass. 186; *Chisolm v. Chisolm*, 41 Ala. 327; *Mercier v. Chase*, 11 Allen (Mass.), 194.

² *Horton v. Hillard*, 58 Ark. 298, 24 S. W. Rep. 242. This case was decided under a statute which provided that "the commissioners appointed to lay off dower in the lands of the deceased husband shall, at the request of the widow to be endowed, lay off the same on any part of the lands of the deceased, whether the same shall include the usual dwelling place of the husband and family or not; provided the same can be

done without essential injury to such estate." Sand. & H. Dig. Ark. (1894), § 2539.

³ *Snoddy v. Leavitt*, 105 Ind. 357, 5 N. E. Rep. 15; *Stowe v. Steele*, 114 Ill. 382, 2 N. E. Rep. 169; *Jonas v. Hunt*, 40 N. J. Eq. 660, 5 Atl. Rep. 148; *Linton v. Crosby*, 61 Iowa, 293, 16 N. W. Rep. 113.

⁴ *Snoddy v. Leavitt*, 105 Ind. 357, 5 N. E. Rep. 13.

⁵ *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. Rep. 813; *Rannels v. Washington University*, 96 Mo. 226, 9 S. W. Rep. 569; *Stovall v. Austin*, 16 Lea (Tenn.), 700.

to improvements made by the alienee of the husband has no application in such cases. The assessments or taxes thus required are such as the governmental authorities deem necessary for the proper enjoyment by all parties in interest of the property. They go in proportion to such interest to the benefit of every person having an estate of whatsoever kind or duration. They are supposed to be made with the consent of all parties, and as the widow during her tenancy, by virtue of her dower, enjoys these benefits, or has a right to enjoy them, the law deems it but equitable that she share her part of the burden of the taxation in proportion to her interest.¹ It is held under a statute which provides that all the right, title and interest of the owner of lands may be sold to pay delinquent taxes, that a sale does not affect the wife's right of dower, where it is also provided that no laches or default of the husband shall prejudice the rights of the wife.² Nor where the statute provides that payment of taxes on land for seven years under color of title confers ownership will the dower right be affected where the payments were made in the life-time of the husband.³

§ 428. **Lost by sale of land for taxes.**—The right of the wife to dower in the lands of her husband, in the absence of a saving statute, is inferior to the right of the state to proceed against the property to realize the taxes legitimately payable thereon and regularly assessed against same. And a sale under proceedings authorized by law for the enforcement of the lien of the state against the lands for the taxes vests in the purchaser a title free from any right or claim to dower. If the wife wishes to protect this estate, whether inchoate before the death of her husband, or consummate upon his demise, she must see that the charges due the state for taxes are paid. Otherwise her dower will be forever lost.⁴ If a stranger purchases the land of the husband at tax sale, this, it has been held, does not extinguish the dower estate, for the purchaser can take no greater interest than could have been conveyed by the

¹ *Jonas v. Hunt*, 40 N. J. Eq. 660, 5 Atl. Rep. 148.

² *Blevins v. Smith*, 104 Mo. 583, 18 S. W. Rep. 213.

³ *Miller v. Pence*, 132 Ill. 149, 23 N. E. Rep. 1030.

⁴ *McWhirter v. Roberts*, 40 Ark. 283. See *Clason v. Ward* (Com. Pl.), 1 Ohio N. P. 218; *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. Rep. 813.

husband, and his payment of the taxes releases the lien of the state.¹

§ 429. Sale under execution against husband.—The sale of land by the sheriff under an execution against the husband cannot operate to extinguish the right of the wife to dower. The husband himself could not defeat the dower interest by any sale or conveyance he might make alone, and the officer selling his interest in land can certainly sell no greater right or interest than he could himself. It is uniformly held, therefore, that a sale of the lands of the husband under an execution against him does not affect the dower right of the wife.² And as the dower right cannot be divested by a sale under ordinary execution, so it cannot in any proceeding or sale under a mechanic's lien created by the husband alone, where the lien comes into existence at some time during the coverture.³ Nor does a judicial sale of the lands of the husband, when the wife has not relinquished her dower, affect her right.⁴ This is true though the widow is made a party to the proceedings and does not even appear.⁵ But a judicial sale of land of the husband, when made in conformity to law, will generally pass all the title the husband had to the purchaser.⁶

¹ *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. Rep. 813.

² *Taylor v. Stockwell*, 66 Ind. 505; *Pattison v. Smith*, 93 Ind. 447; *Mausur v. Hinkson*, 94 Ind. 395; *Blevins v. Smith*, 104 Mo. 583, 16 S. W. Rep. 213; *Vinson v. Gentry* (Ky.), 21 S. W. Rep. 578; *House v. Fowle*, 22 Oreg. 303, 29 Pac. Rep. 890; *Dayton v. Corser*, 51 Minn. 406, 53 N. W. Rep. 717; *Ayer v. Spring*, 10 Mass. 80; *Parker v. Parker*, 17 Mass. 564; *McClanahan v. Porter*, 10 Mo. 746; *Summers v. Babb*, 13 Ill. 483; *Blain v. Harrison*, 11 Ill. 384; *Taylor v. Fowler*, 10 Ohio, 567; *Nance v. Hooper*, 11 Ala. 552; *Dunham v. Osborne*, 1 Paige, 634; *Merchants' Bank v. Thompson*, 55 N. Y. 7; *Tompkins v. Fonda*, 4 Paige, 448; *Gould v. Lockett*, 47 Miss. 96; *Wood v. Morgan*, 56 Ala. 397; *Kitz-miller v. Van Rensselaer*, 10 Ohio St. 63; *Combs v. Young*, 4 Yerg. (Tenn.)

255; *Linde v. Wakefield*, 19 Mont. 23, 47 Pac. Rep. 5; *Wright v. Tichenor*, 104 Ind. 185, 3 N. E. Rep. 853; *Butler v. Fitzgerald*, 43 Neb. 192, 61 N. W. Rep. 192; *Price v. Hobbs*, 47 Md. 359; *Efland v. Efland*, 96 N. C. 488, 1 S. E. Rep. 858.

³ *Pifer v. Ward*, 8 Blackf. (Ind.) 251; *Schaeffer v. Weed*, 3 Gilm. (Ill.) 511; *Gove v. Cather*, 23 Ill. 634.

⁴ *Jeffries v. Allen*, 34 S. C. 189, 13 S. E. Rep. 365; *Dillman v. Will Co. Nat. Bank*, 138 Ill. 282, 27 N. E. Rep. 1090; *Monroe v. Crouse*, 59 Hun, 248, 12 N. Y. S. 815; *Motley v. Motley* (Neb.), 73 N. W. Rep. 738; *Sisk v. Smith*, 1 Gilm. (Ill.) 503; *Grady v. McCorkle*, 57 Mo. 172.

⁵ *Motley v. Motley* (Neb.), 73 N. W. Rep. 738.

⁶ *Felton v. Elliott*, 66 N. C. 195; *Gatewood v. Tomkinson*, 113 N. C. 312, 18 S. E. Rep. 318.

§ 430. **Personalty — Execution — Rights of widow.**— By the common law the wife had no dower in the personal property of the husband and the same could be reached at any time by his creditors. But by statute in some of the states the wife is endowed of a certain part of the personalty, usually a third, and this right is paramount to that of the creditors of the husband unless they perfect their right to resort thereto in his life-time and thereby cut off the right of the wife. This, however, could not be done if the statute creating a dower interest in personalty should vest the interest in all the goods and personalty of the husband of which he was seized in his own right at any time during the marriage. Usually, though, these statutes allowing a dower right in personalty limit it to that of which the husband was seized at the time of his death, not at any time during coverture. So, under a statute providing that a widow shall be entitled to one-third of the property of which her husband was seized at the time of his death, it is held that this dower right in personalty is lost where the property is seized under execution during the life of the husband, though not sold until his death, because the seizure by the officer necessarily operates to disseize the husband.¹ But the mere placing of an execution against the husband in the hands of an officer, though this by operation of law fixes a lien upon all his personal property in the bailiwick, does not cut off the right of dower in personalty under such a statute, as the lien, of itself, does not dispossess the husband.² Of course, under such a statute, a sale of the property by the husband before his death cuts off the right of dower.³ But a testamentary disposition of personalty is held not to be a disposition in the life-time of the husband, for this cannot take effect until his death, at which time the dower right of the wife asserts itself and becomes perfect. So, the husband cannot make a testamentary disposition of his personalty with the intention or purpose of cheating his wife of her dower.⁴ But, of course, the burden of showing this fraudulent intention of the husband is on the widow alleging it.⁵

¹ Arnett v. Arnett, 14 Ark. 57.

² James v. Marcus, 18 Ark. 421.

³ Arnett v. Arnett, 14 Ark. 57;
Street v. Saunders, 27 Ark. 554.

⁴ Brandon v. Dawson, 51 Mo. App.

237. And see Patterson v. Patterson
(Ky.), 24 S. W. Rep. 880.

⁵ Brandon v. Dawson, 51 Mo. App.
237.

§ 431. Sale under execution against widow.—The widow's dower is not subject to seizure or sale under execution until it has been allotted and set apart to her in manner provided by law. Until then it is nothing more than a kind of blended interest in the realty, becoming tangible, known and certain upon proper allotment, at which time it first becomes subject to seizure.¹ It is then tangible, definite and certain, and when regularly sold under execution against the widow, the vendee will take all the right, title and estate the widow had.

§ 432. Right of wife where she culpably deserts her husband.—The right of the wife to dower in the estate of her husband depends upon the marital status and her fidelity to that relation. If she culpably abandons or deserts her husband and thereby renounces the relation, she is not in an attitude to ask the courts to allot to her dower out of his estate. Such conduct on her part is not consistent with her status as wife nor her duty to her husband in any sense, and the law does not allow her to claim dower when, by her own fault, she has placed herself in an attitude where she cannot, with good grace, claim such an estate.² Upon the same principle, where a woman has a living husband at the time of her marriage to a second, she will not be entitled to dower in the property of the second husband, for this marriage is void as against public policy, and, of course, a marriage which is void cannot form the basis of any property rights. Indeed, it would seem, upon principle, that where a woman deserts her husband and marries another, she should have dower in the estate of neither husband, for, by the second marriage, no rights accrue to her, it being contrary to law; and by deserting her first husband and marrying another, she estops herself to claim dower in the estate of the first.³ Of course, if the conduct of the husband towards the wife should be such as to justify her in leaving him, she would not be deprived of her right of dower upon going away under

¹ Pennington v. Yell, 11 Ark. 212; E. Rep. 178; Odiorne's Appeal, 54 Pa. Tompkins v. Fonda, 4 Paige, 448; Tor-

rey v. Minor, 1 Sm. & M. Ch. (Miss.) 489; Ritchie v. Putnam, 13 Wend. 526; Rausch v. Moore, 48 Iowa, 611.

² Robinson v. Greenoild, 1 Salk. 119; McCreery v. Davis, 44 N. C. 195, 22 S.

³ See Davis v. Calvert (Ky.), 38 S. W. Rep. 884; Henderson v. Chaires, 25 Fla. 26, 6 S. Rep. 164; Gross v. Froman, 89 Ky. 318, 12 S. W. Rep. 587.

the force of such circumstances, for the husband is not permitted to deprive his wife of her dower right by making her life so intolerable she cannot live with him.¹

§ 433. Statute of limitations.—It is an elementary principle that the statute of limitations never runs against any person until there is a present cause of action and right to assert the same in the courts. The statute therefore could not run against the widow until she is entitled by law to bring an action therefor. At common law the powers of a *feme covert* were very narrow. But upon the death of her husband the disabilities of coverture were removed by operation of law, just as they were imposed by the marriage. It has been said that in the English law there is no statute bar to the right of dower.² This must be taken with some allowance, as Chancellor Kent himself admits that when a fine is levied by the husband this will bar her by force of the statute of non-claim unless action is brought by her for her dower within the period allowed.³ But a fine under the old English common law is practically unknown in this country. This was a proceeding in court to effect a conveyance and conclusion of the right of one of the parties to certain lands. There would be either a *bona fide* or fictitious suit entered by the party seeking to get title from the other, or seeking a conveyance or acquittance, and the result would usually be reached by agreement with the sanction of the court. This consent of the court resulted in a kind of decree assuring title to the complainant and divesting it from the defendant, by virtue of which actual delivery was not necessary. The party acquiring the title to the land in this way became owner and entitled to all the privileges and appurtenances thereunto belonging. But this could not have the effect of depriving the wife of her dower right. She was entitled to her writ of dower practically at any time, and it was generally held in England under the old practice that the statute of limitations would not run against this right of the widow.⁴ Some of the courts of this country have made similar rulings.⁵ And usually

¹ Appeal of Nye, 126 Pa. St. 341, 17. Atl. Rep. 618.

² 4 Kent, Comm. 70.

³ 4 Kent, Comm. 70.

⁴ 4 Kent, Comm. 70; Stidham v. Matthews, 29 Ark. 650, 660.

⁵ Parker v. Obear, 7 Metc. (Mass.) 24; Barnard v. Edwards, 4 N. H. 107.

this would be held to be the case where only the heirs or others in privity with the husband were interested, for it is generally the duty of these to see that the dower is promptly assigned to the widow, and their possession or claim is not considered adverse to that of the widow; consequently there is nothing in cases of this kind to call the statute into operation. But where the rights of strangers are concerned, the rule seems to be different. As to such persons the widow is at arm's length. As against these, she has her right of action for dower, and may recover such right in the proper courts. Having the right to thus assert her claim as to strangers, it is held, with apparently good reason and logic, that the statute begins to run against her as soon as the right in her accrues to assert her rights concerning her interest, and, when it has run for the full period, she will be as effectively barred of all dower rights as any other person against whom adverse possession of realty has been held for the period required and laid down by the statute of limitations.¹ And under the old common law, as modified by parliament in the fourth year of the reign of Henry VII., the widow must assert her right to dower within five years after the recovery of a fine or else be forever barred and precluded from the right to do so.²

In this country the widow usually has the right to require an assignment or allotment of dower immediately upon the death of her husband, as against his heirs and privies, and, as to strangers, her right to the dower interest is perfect the same instant. It is usually held, therefore, that the statute of limitations will begin to run against her in favor of strangers who hold adversely to her right immediately upon the death of her

And see *Moore v. Frost*, 3 N. H. 126; *Robie v. Flanders*, 33 N. H. 524; *Tooke v. Hardeman*, 7 Ga. 20; *Barksdale v. Garrett*, 64 Ala. 277.

¹ *Danley v. Danley*, 22 Ark. 263; *Stidham v. Matthews*, 29 Ark. 650, 660; *Boyle v. Rowland*, 3 Desaus. (S. C. Eq.) 556; *Tuttle v. Wilson*, 10 Ohio. 24; *Berrien v. Connover*, 1 Harr. (N. J.) 107; *Elyton Land Co. v. Denny*, 108 Ala. 553, 18 S. Rep. 561; *Elyton Land Co. v. Denny*, 96 Ala. 337, 11 S. Rep. 218; *Graves Co. v. McDade*, 108 Ala. 420, 19 S. Rep. 86; *Stowe v. Steele*, 114 Ill. 382, 2 N. E. Rep. 169; *Livingston v. Cochran*, 33 Ark. 294, 307; *Torrey v. Minor*, 1 S. & M. Ch. (Miss.) 489; *Chase v. Alley*, 82 Me. 234, 19 Atl. Rep. 397; *King v. Merritt*, 67 Mich. 194, 34 N. W. Rep. 689; *Hancock v. Kelley*, 81 Ala. 368, 2 S. Rep. 281.

² 2 Bl. Comm. 354; 4 Kent, Comm. 70.

husband, and that the dower right will be completely barred at the end of the limitation period, computing time from the death of the husband, or such other time as, by the local law, the cause of action for dower first accrued.¹ Where the law imposes upon the heir the duty of assigning dower to the widow, the statute will not run in his favor against the suit for dower by the widow until the assignment is properly made.² And the statute does not run against the widow in favor of one holding under a claim to the widow's interest where dower has not been allotted nor set apart to the widow as required by law.³ But it runs against the widow in favor of a purchaser at a mortgage foreclosure after the death of the husband from the time of the purchase.⁴ Though possession under color of title or claim of ownership, or both, does not affect the widow's dower right during the life of the husband, no matter how hostile, continuous or exclusive; and while such hostile possession, coupled with a claim of ownership for the statutory period, would ripen the claim of the possessor into a perfect title so far as the husband is concerned, yet such possession during the life of the husband for any period cannot avail to defeat the wife's dower.⁵ This is necessarily true because the widow could not sue for her dower until the death of the husband, for, until then, her right of action is not consummate. A suit for this purpose by her at an earlier time could avail her nothing.

§ 434. Mineral lands.—As the wife has the right to dower in all the lands of which her husband was, at any time during the marriage, seized of an estate of inheritance in his own right, it follows that she would be entitled to dower in mineral lands as well as others. The law does not make any distinction, nor

¹ *Stidham v. Matthews*, 29 Ark. 650; *Smith v. Wehrle*, 41 W. Va. 270, 23 S. E. Rep. 712; *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. Rep. 813; *Robinson v. Ware*, 94 Mo. 678, 8 S. W. Rep. 153; *Beard v. Hale*, 95 Mo. 16, 8 S. W. Rep. 156; *Farris v. Coleman*, 103 Mo. 358, 15 S. W. Rep. 767; *Winters v. De Turk*, 133 Pa. St. 359, 19 Atl. Rep. 354.

² *McWhirter v. Roberts*, 40 Ark. 283; *Webb v. Smith*, 40 Ark. 17.

³ *Osborn v. Weldon* (Mo.), 47 S. W. Rep. 936.

⁴ *McWhirter v. Roberts*, 40 Ark. 283.

⁵ *Taylor v. Lawrence*, 148 Ill. 388, 36 N. E. Rep. 74; *Hurleman v. Hazlette*, 55 Iowa, 256, 7 N. W. Rep. 600; *Boling v. Clark*, 83 Iowa, 481, 50 N. W. Rep. 57; *Moore v. Frost*, 3 N. H. 126; *Williams v. Williams*, 89 Ky. 381, 12 S. W. Rep. 760.

restrict the dower right to any particular kind of land.¹ There seems to be a serious conflict among the authorities, however, as to whether the widow has dower in unopened mining lands. The English authorities, beginning, perhaps, with the case of *Stoughton v. Leigh*,² lay down the rule that the wife is dowable out of only such mines as have been opened or operated in the life-time of the husband. This precedent has been followed by a number, and perhaps a majority, of the decisions in this country.³ These cases usually follow the old English idea of feudal tenure, by reason of which it was the policy of the English courts, as well as of the old English law, to hold together, as far as might be, the large estates owned by subjects, and usually the favored subjects, of that kingdom. In the leading English case of *Stoughton v. Leigh*,⁴ the husband left a valuable estate upon which there was both a lead and coal mine, neither of which had been opened. There were also on the estate two other lead and coal mines which the husband had leased to tenants for mining purposes at a certain rental. One of each of these mines had been opened by the tenants at the time of the death of the husband, and it was held by the learned court that the wife was dowable in the mines which had been opened, but not in those which had not. The supreme court of Michigan, reviewing and criticising this case, remarks that "the decision may not be without reason, but certainly no reasons are given in the opinion."⁵ The learned Michigan court, continuing, say further: "The rule laid down in that case (*Stoughton v. Leigh*) undoubtedly had its origin in cases where the relation of landlord and tenant existed. A tenant who rents a farm cannot cut and sell the timber therefrom, convert the farm into a brick-yard, bore for oil or mine for ore thereon. . . .

¹ *Clift v. Clift*, 87 Tenn. 17, 9 S. W. Rep. 198; *Seager v. McCabe*, 92 Mich. 186, 52 N. W. Rep. 299; 4 Kent, Comm. 41.

² 1 Taunt. 402. And see *Clavering v. Clavering*, 2 P. Wms. 388.

³ *Irwin v. Covode*, 24 Pa. St. 162; *Hendrix v. McBeth*, 61 Ind. 473; *Freer v. Stotenbur*, 36 Barb. 641; 1 Scribner, Dower, 189; 4 Kent, Comm. 41; *Coates v. Cheever*, 1 Cowen, 460; *Findlay v. Smith*, 6 Munf. (Va.) 134;

Crouch v. Puryear, 1 Rand. (Va.) 258; *Billings v. Taylor*, 10 Pick. (Mass.) 460; *Gaines v. Mining Co.*, 33 N. J. Eq. 603; *Neel v. Neel*, 19 Pa. St. 323; *Moore v. Rollins*, 45 Me. 493; *Lenfers v. Henke*, 73 Ill. 405; *Black v. Elkhorn Min. Co.*, 49 Fed. Rep. 549; *Whattaker v. Lindley* (Ky.), 3 S. W. Rep. 9.

⁴ 1 Taunt. 402.

⁵ *Seager v. McCabe*, 92 Mich. 186, 52 N. W. Rep. 299.

But one who rents a piece of ground upon which there is an open quarry, or sand pit, or brick-yard, or open mine, may quarry, take out sand, make brick or operate the mine," unless there is an express or implied reservation to the contrary.¹ The leading English case has been repudiated in this country to the extent that it forbids the widow to work any mines not opened at the time of the death of the husband, where some have been opened or worked. In a Massachusetts case, where the husband died seized of a slate quarry which was principally below the surface, a quarter of an acre had been dug over, and the practice was to take small sections of the land, quarry for a certain depth, and begin at the surface again, all of which had been done before the death of the husband. But there was quite a large portion of it where no slate had been taken. It was held that the widow had the right to take slate from unopened quarries as well as from those previously opened.² If the mine has been used in the life-time of the husband, but its use long discontinued before the death of the husband, the widow will nevertheless be entitled to re-open the mine and use the same.³

While the widow may, if she wish, use the mining right to which she succeeds by virtue of her right of dower, yet she could, of course, use no land of her late husband for mining purposes except to the extent of her dower interest or the land set apart to her as dower. By her dower right she becomes the life tenant of the lands of her husband to the extent of one-third, and a life tenancy is such an estate as will authorize the life tenant to use any opened mine or others capable of being operated, to the extent of exhausting the same.⁴ The right of the widow to take mineral from the lands of her husband by reason of her dower right begins at the time of his death.⁵ And if she should exhaust the mineral, she would still

¹ *Seager v. McCabe*, 92 Mich. 186, 52 N. W. Rep. 299. The reader will find much learning and enlightened reason displayed in this case, and very strong reasons are given for the conclusions reached. Many authorities are cited and reviewed and a number of them ably criticised.

460. To like effect see, too, *Crouch v. Puryear*, 1 Rand. (Va.) 258.

³ *Gaines v. Mining Co.*, 33 N. J. Eq. 603.

⁴ *Neel v. Neel*, 19 Pa. St. 323; *Sayers v. Hoskinson*, 110 Pa. St. 473, 1 Atl. Rep. 308.

⁵ *Clift v. Clift*, 87 Tenn. 17, 9 S. W. Rep. 198.

² *Billings v. Taylor*, 10 Pick. (Mass.)

have her dower for any other uses of which the lands are susceptible.¹ As a rule, the dower in mining lands should be set apart to the widow so as to insure her the right to work one-third of the mines, or, if this cannot be done, the court should direct that she be paid a proper royalty from the proceeds.² The fact that land is useful for no other purpose than mining, that it will not grow agricultural products, that it is not valuable by reason of the right of piscary, that it does not yield income as a ferry privilege or any other particular kind of income, certainly should not deprive the widow of all right of dower. That the mineral in a body of land is part and parcel thereof goes without saying.³ "Land hath . . . an indefinite extent, upwards as well as downwards. . . . Upwards, therefore, no man may erect any building or the like to overhang another's land; and downwards, whatsoever is in a direct line between the surface of any land and the center of the earth belongs to the owner of the surface, as is every day's experience in the mining countries. So that the word 'land' includes not only the face of the earth, but everything under it or over it. And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters and his houses, as well as his fields and meadows."⁴ This elementary proposition of law thus laid down by the illustrious commentator must be accepted as correct. It certainly seems reasonable that he who succeeds to a life estate in lands, whether by direct grant, or, in the case of a wife, by virtue of her dower estate, should be permitted to put the land, to the extent of her dower interest, to all the uses during the tenancy of which it is susceptible, proper care being taken, however, not to injure the freehold except to the extent necessary to the full enjoyment of the life estate. It is easy enough to conceive of land which has no value except for mining purposes, whether the mines be opened or unopened. If they be not developed in whole or in part, some of the authorities contend that the widow has no right to utilize the lands for the

¹ Clift v. Clift, 87 Tenn. 17, 9 S. W. Rep. 198.

³ Lenfers v. Henke, 73 Ill. 405; 2 Bl. Comm. 18.

² Coates v. Cheever, 1 Cowen, 460. And see Clift v. Clift, 87 Tenn. 17, 9 S. W. Rep. 198.

⁴ 2 Bl. Comm. 18.

only production of which they are capable; that is, mining. A husband may leave his wife valuable lands indeed, but, if she has no right to enjoy them or the uses and profits arising therefrom, it is certainly a vain thing to give her a dower interest therein; for she must, during her life tenancy, protect the lands from the ravages of taxation in order that she may enjoy her dower privileges fully. But what profit could it be to pay taxes on lands for the period of her natural life and all the while be forbidden the privilege of realizing any profit, because the lands are not capable of yielding an income except from the mines they contain, and no mine has been opened or developed in the life-time of the husband. In such a case, if the rule that she has no right to realize any profit from mineral except where a mine has been opened before the death of the husband, she has, in fact, no dower interest. She may have in name, but it is really no interest in fact, for she cannot utilize the land nor in any way derive any profit therefrom. The heirs may at once open up the mines and exhaust the same without accounting to the widow for the smallest part of the production or profit. Such a rule does not commend itself to a very high sense of justice.

§ 435. Allotment at common law.—In most of the American states, perhaps, the old form of allotment or assignment of dower has been abolished. Provision is made for the allotment in various ways, usually through proceedings in probate or similar courts. But at common law it was the duty of the tenant of the freehold to assign to the dowress her estate, and if he failed, refused or neglected this, a writ of dower would lie at the instance of the widow to compel him to do so.¹ This being true, an action for this purpose should be brought against such tenants, and it will not lie against one claiming a mere chattel interest in the realty, or an interest less than that of the widow.² The reason of this rule is, it would not be proper to permit the owner of the freehold to be bound by an allotment or assignment of dower by one having an interest of less duration than that of the dowress, or an interest inferior to that

¹ Coke, Litt. 39, 35a; *Ellicott v. Mosier*, 7 N. Y. 201. 85, 94; *Hurd v. Grant*, 3 Wend. 340; *Drost v. Hall*, 52 N. J. Eq. 68, 28 Atl.

² *Galbraith v. Green*, 13 S. & R. (Pa.) Rep. 81.

of the owners of the freehold, as, for instance, that of the heirs or devisees, who take the freehold absolutely, subject to the dower right of the widow. No assignment of dower not made by them could bind them, and an assignment regularly made by them would effectively fix the dower right. None but the tenants of the freehold have a right to assign the widow her dower, and certainly no useful purpose could be served by suing parties for dower who have not the authority, or are not allowed by law, to assign or set it apart. If the husband has sold certain parcels of his land to divers persons, the wife will not be entitled to dower out of the lands as a whole, at common law, but only one-third of each tract separately owned.¹ The wife, therefore, cannot bring her writ of dower against all the owners in one action, but must sue each one separately for her dower in the tract.² This being true, it is, of course, not necessary for the widow, in suing for dower in one tract of land, to join as defendants any owners of other tracts.³ And if the wife should join in a mortgage of the husband's land, it would not be equitable to allow her dower out of all the lands, just as though she had not done so; but the assignment of dower out of the mortgaged and unmortgaged lands should be made separately,⁴—any assignment made out of the mortgaged lands being, of course, subject to the mortgage.

§ 436. Assignment—Rules governing as to value.—Whenever commissioners are appointed to allot or assign to a widow her dower in the property of her deceased husband, it is not their duty to apportion her simply one-third of the land, for, in contemplation of law, she is entitled to a third of the rents and profits for life of all the realty of whatsoever grade. So, it is clear that the assignment of a third merely, without reference to the value, is not proper or just to her. The allotment to which she is entitled is an amount which will be the value to her, properly managed, of one-third of all the lands, and the

¹ In *re* Garrison, 15 N. J. Eq. 96; Droste v. Hall (N. J. Eq.), 29 Atl. Rep. 487; 2 Scribner, Dower, § 603.

² Droste v. Hall (N. J. Eq.), 29 Atl. Rep. 487; Morgan v. Blatchley, 83 W. Va. 115, 10 S. E. Rep. 282.

³ Coburn v. Harrington, 114 Ill. 104, 29 N. E. Rep. 408.

⁴ Askew v. Askew, 103 N. C. 285, 9 S. E. Rep. 646.

courts are liberal in assuring this.¹ By the common law the widow has a right to have one-third of the lands and tenements of which she is dowable assigned to her. And this is done by admeasurement when practicable, and when thus set apart to her it becomes hers for life. When dower is thus assigned by metes and bounds, it is said to be set apart "according to common right." But if the property does not admit of an equitable assignment, whereby the rights of the widow may be fully protected, whether this difficulty should arise from the nature of the interest of the husband or the quality or naturally indivisible nature of the property, an assignment in lieu of dower is made, and this kind of an assignment is called an assignment "against common right." An assignment of this kind is so made as to yield the widow a third of the rents and profits of the entire estate.² But whenever the property can be fairly divided so as not to prejudice the rights of the widow or others in interest, dower is to be allotted by metes and bounds.³ It is not required, however, that dower be measured off of every piece of realty of which the husband was seized, but an allotment equal in value for dower purposes to one-third of all the realty may be made where the interest of the husband is not claimed by more than one person, and when done the widow will not be entitled to dower out of any other lands.⁴ When a person dies, his lands descend to his legal heirs, subject to the right of the wife to assert her dower. It is held, therefore, that

¹ Skolfield v. Skolfield, 88 Me. 258, 34 Atl. Rep. 27; Fuller v. Conrad's Adm'r, 94 Va. 233, 26 S. E. Rep. 575. "In the assignment of dower, commissioners are to regard the rents and profits only of the several parcels of the estate out of which the dower is to be assigned. When they have ascertained the annual income of the whole estate, they ought to set off to the widow such a part as will yield her one-third of such income, in parcels best calculated for the convenience of herself and of the heirs. This rule is adapted equally to protect widows from having an unproductive part of an estate assigned to them, and to guard heirs from being

left, during the life of the widow, without the means of support." Leonard v. Leonard, 4 Mass. 533.

² Sanders v. McMillan, 98 Ala. 144, 11 S. Rep. 750; Stephens v. Stephens, 3 Dana (Ky.), 371.

³ Dunseth v. United States Bank, 6 Ohio, 76; McClanahan v. Porter, 10 Mo. 746; White v. Story, 2 Hill (N. Y.), 543.

⁴ Tiedeman, Real Property, § 135; Richmond v. Harris (Ky.), 43 S. W. Rep. 703; Rockafellow v. Peay, 40 Ark. 69; Moore v. Dick, 134 Ill. 43, 24 N. E. Rep. 768; White v. Story, 2 Hill (N. Y.), 543; Cazier v. Hinchey (Mo.), 44 S. W. Rep. 1052.

the administrator or executor of the deceased husband is not a necessary party to an action against the heirs for dower.¹ It is held in North Carolina, however, where the statute prescribes "that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff," and that "the heirs, devisees and other persons in possession or claiming estates in the land shall be parties to such proceeding," that even a creditor of the deceased husband may be made a party in a proceeding to have dower allotted, in order that they may resist an excessive allotment.² This being true, it naturally follows that an assignment of dower will have no force against a party in interest not properly brought into court.³ And in no event will the wife be entitled to an assignment or allotment of dower before the death of her husband.⁴

§ 437. Fraudulent ante-nuptial conveyance by husband.—When a man contemplates matrimony he has no right to convey his property, in which his intended wife would take an interest by virtue of the marriage, for the purpose of defeating this right. This is a fraud detestable in the eye of the law, and such as will always afford ground of relief at the instance of the injured wife.⁵ Of course an innocent purchaser having no notice of fraud or of such facts as would lead to the ascertainment of fraud would be protected; but if he had knowledge of the fraudulent purpose, either actual or constructive, he would take subject to the dower right.⁶ But a conveyance by a man who had been once married, and after a contract for a second marriage, to his children of a reasonable advancement, retaining a sufficiency to enable him to properly take care of his wife, will not be in fraud of her dower right, where he made no property representations to her at the time of the contract or as an inducement thereto.⁷ And where the wife has a certain part of the real estate of her husband absolutely as, or in lieu of,

¹ *Kenyon v. Kenyon*, 17 R. L. 539, 23 Atl. Rep. 101.

² *Welfare v. Welfare*, 108 N. C. 372, 12 S. E. Rep. 1025.

³ *Vickers v. Henry*, 110 N. C. 371, 15 N. E. Rep. 115.

⁴ *Grube v. Lilienthal* (S. C.), 29 S. E. Rep. 230.

⁵ *Bookout v. Bookout* (Ind.), 49 N. E. Rep. 824; *Dearmond v. Dearmond*, 10 Ind. 191; *Stratt v. O'Neil*, 84 Mo. 68.

⁶ *Bookout v. Bookout* (Ind.), 49 N. E. Rep. 824; *Bremer v. Connell*, 11 Humph. (Tenn.) 500.

⁷ *Alkire v. Alkire*, 134 Ind. 350, 32 N. E. Rep. 571.

dower by the local law, a conveyance by the husband before marriage for the purpose of defeating her interest will not defeat this interest as between the husband and wife and strangers with notice, any more than it would where the common-law estate of dower is not modified by statute.¹ Of course, such a fraudulent purpose is to be gathered from all the facts and circumstances surrounding the transfer.² And this being true, it is properly held that a deed by an intended husband, executed to a near relative without any pecuniary consideration, and just on the eve of his marriage, is a fraud on the dower right of the intended wife.³ And where the conveyance expressly stipulates that it is to defeat the dower interest, it will be void to this extent.⁴

§ 438. Estate cannot be defeated by act of husband.—The husband alone cannot do any act that will defeat the right of the wife to dower after the estate has once vested. His alienation or other disposition of the realty without her consent will be a nullity so far as this estate is concerned, and the wife can enforce her right to the same after the land has passed into the hands of third parties, as though no transfer of any kind had been made.⁵ Upon this principle it is correctly held, where lands of the husband are taken in execution against him and sold thereunder, the execution by the husband without the wife joining, of a quitclaim deed to the purchaser, will not in any

¹Smith v. Smith, 22 Colo. 480, 46 Pac. Rep. 128; Smith v. Smith (Colo.), 52 Pac. Rep. 790.

²Smith v. Smith, 22 Colo. 480, 46 Pac. Rep. 128; Hamilton v. Smith, 57 Iowa, 15, 10 N. W. Rep. 276.

³Swain v. Perine, 5 Johns. 482.

⁴McGhee v. McGhee's Heirs, 4 Ired. (N. C.) 105.

⁵Malloney v. Horan, 49 N. Y. 111; 2 Bl. Comm. 132; Mills v. Van Voorhis, 20 N. Y. 412; Grissom v. Moore, 106 Ind. 296, 6 N. E. Rep. 629; Littlefield v. Crocker, 30 Me. 192; Hill v. Mitchell, 5 Ark. 608; Union Pac. Ry. Co. v. Barnard & L. Mfg. Co., 1 Kan. App. 23, 41 Pac. Rep. 201; Clifford v. Kampfe, 147 N. Y. 383, 42 N. E. Rep.

1; Graves v. Fligor, 140 Ind. 25, 38 N. E. Rep. 853; Benton v. Nanny, 8 Barb. 618; Simar v. Kanaday, 53 N. Y. 298; Davis v. Wetherell, 13 Allen (Mass.), 60; Bonfoey v. Bayne, 100 Mich. 82, 58 N. W. Rep. 620; Flowers v. Flowers, 89 Ga. 632, 15 S. E. Rep. 834; Verlander v. Harvey, 36 W. Va. 374, 15 S. E. Rep. 54; Eberle v. Fisher, 13 Pa. St. 526; Worcester v. Clark, 2 Grant Cas. (Pa.) 84; Kirk v. Dean, 2 Bin. (Pa.) 341; Munger v. Perkins, 62 Wis. 499, 23 N. W. Rep. 511; Appeal of Shea, 121 Pa. St. 302, 15 Atl. Rep. 629; McLanahan v. Griffin, 168 Ill. 31, 48 N. E. Rep. 315; Benson v. Scott, 3 Lev. 385; Grady v. McCorkle, 57 Mo. 172.

way affect the dower interest.¹ And as the husband cannot, by ordinary conveyance, defeat the dower interest, so he cannot do so by an assignment of all his property in bankruptcy.² Nor can it be defeated by a gift *causa mortis*, for this is still a conveyance by the husband.³ And it is not defeated by an assignment of all the husband's property executed by him alone.⁴ Nor is it extinguished, of course, by the execution of a mortgage by the husband alone.⁵ And the fact that the husband may sell or transfer his realty to a *bona fide* purchaser for value makes no difference. The purchaser must ascertain at his peril whether he is dealing with a married man or not; and if he is, must see that the dower interest of the wife is relinquished as required by law.⁶ But where by statute the wife's right of dower is restricted to such lands as the husband may die seized of, or where she is denied dower when a non-resident, a sale by the husband of his land will prevent the right of dower from attaching, and it will not be necessary that the wife join in or even consent to the sale.⁷ And the husband may convey his land in his life-time, even against the will of the wife, so as to pass his interest, and this necessarily includes a right of possession as against the wife, which the purchaser may enforce against her at any time during the life of the husband.⁸

¹ Lynde v. Wakefield, 19 Mont. 23, 47 Pac. Rep. 5.

² St. John v. Dann, 6 Conn. 401, 34 Atl. Rep. 110; Anderson v. Hall (Ky.), 35 S. W. Rep. 904; Gannon v. Widman, 3 Pa. Dist. Rep. 835; Porter v. Lazear, 109 U. S. 84, 8 Sup. Ct. Rep. 58; Eberle v. Fisher, 13 Pa. St. 526.

³ Hatcher v. Buford, 60 Ark. 169, 20 S. W. Rep. 641; Dunn v. Bank, 109 Mo. 90, 18 S. W. Rep. 1139; Straat v. O'Neil, 84 Mo. 68.

⁴ Chase v. Van Meter, 140 Ind. 321, 39 N. E. Rep. 455; Shinkle's Assignees

v. Bristow, 95 Ky. 84, 23 S. W. Rep. 670.

⁵ Nelson v. Brown, 144 N. Y. 384, 39 N. E. Rep. 355.

⁶ Mitchell v. Farrish, 69 Md. 235, 14 Atl. Rep. 712; Caldwell v. Caldwell, 28 S. C. 580, 6 S. E. Rep. 818.

⁷ Ligare v. Semple, 32 Mich. 438; Atkins v. Atkins, 18 Neb. 474, 25 N. W. Rep. 724; McGhee v. McGhee, 4 Ired. (N. C.) 105.

⁸ Deans v. Pate, 114 N. C. 194, 19 S. E. Rep. 146.

CHAPTER VI.

PARENT AND CHILD.

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§ 439. Definition of the word "child." — The word *child* or *children*, when used in the books, always means legitimate child

or children, unless another meaning is expressly mentioned.¹ But while the term *children* only includes legitimate children, yet, if it clearly appears that the intention is to include both illegitimate and legitimate children, it will be held to include bastards. This intention may be shown by extrinsic evidence, but it must be made to affirmatively appear, otherwise bastards will not be held to be included.² It has even been held, where a bequest is made to "all and every child or children of the testator's late son, Thomas Swaine, deceased, equally to be divided between or amongst them, to hold as tenants in common and not as joint tenants, and to the respective heirs of the body of all and every such child or children," and where Swaine left only one legitimate child, though he had two bastards, that the legitimate child would take under the will to the exclusion of the bastards.³ The word *child* generally means a natural, lineal, immediate, legal descendant, and does not mean a grandchild. So a bequest of property "to be divided amongst all children, their heirs or assigns, in equal shares," does not embrace a child of a deceased son or daughter of the testator.⁴ Nor does the word include an adopted child, though by statute such adopted child becomes, by operation of law, the child and heir of its adopting parents.⁵ But when the word is used to denote the descendants of a person, it is sometimes construed to include grandchildren.⁶ And it is sometimes held to include an adopted child, when mentioned in statutes of descent, where the manifest purpose of the testator was to include all who could inherit, the adopted child being authorized by law to inherit.⁷ Again, the word *child* or *children* will be held to mean minor child or children or such as are under the age prescribed

¹ Cooley v. Dewey, 4 Pick. (Mass.) 93; Wilkerson v. Adam, 1 Ves. & Bea. 422, 465; Sherman v. Angel, 1 Bai. (S. C. Eq.) 351; Adams v. Adams, 154 Mass. 290, 28 N. E. Rep. 260; Floyd v. Floyd, 97 Ga. 124, 24 S. E. Rep. 451; Heath v. White, 5 Conn. 228; Kent v. Barker, 2 Gray (Mass.), 535; Durant v. Field, 5 De G. & Sm. 343; Cartwright v. Vawdry, 5 Ves. 530; Blacklaws v. Milne, 82 Ill. 505; Andros v. Andros, 24 Ch. Div. 637.

² Shearman v. Angel, 1 Bai. (S. C. Eq.) 351.

³ Swaine v. Kinnerly, 1 Ves. & Bea. 469.

⁴ Dickinson v. Lee, 4 Watts (Pa.), 82. See, too, Hindry v. Holt (Colo.), 51 Pac. Rep. 1002.

⁵ Shafer v. Eneu, 54 Pa. St. 304.

⁶ In re Williams' Est., 62 Mo. App. 339.

⁷ Power v. Hafley, 85 Ky. 671, 4 S. W. Rep. 683.

by law when they may contract and assert rights generally with like effect as those *sui juris*.¹ Under a constitutional provision allowing to each head of a family of minor children certain exemptions, a single child will be sufficient to confer the right of exemption as effectively as though there were more than one.² And the word *child* is sometimes used, especially in wills and matters pertaining to the laws of descent, as synonymous with the word *heir*, and *vice versa*.³ In a penal statute forbidding any one to cruelly treat a child, the word is construed to mean a young child, not one so near grown as to have practically the strength of an adult.⁴

§ 440. Liability of parent for torts of child — General rule.— The general rule is, a parent will be liable to a stranger injured by the wrongful or negligent act of his child, but only when the tort is committed with the connivance or consent of the parent, or in his presence without objection, or under circumstances of any kind from which it may be inferred that the parent had knowledge of the act and used no effort to avert it, or that he knew it would be done and failed to make such effort, or where the facts and circumstances are such as to fix upon him constructive notice of the wrongful act, or where it was his duty to apprise himself of the act and he negligently or purposely refused to apprise himself of the conduct, or where it is the result of a negligent or improper performance of domestic service by the child for the parent.⁵ So where the son is driving another, the father being present and riding in the same vehicle, whereby a third party is injured on account of the negligence of the son in driving, which negligence

¹ Thomas v. Sybert, 61 Ark. 575, 33 S. W. Rep. 1059.

² Roundtree v. Dennard, 59 Ga. 629.

³ Hindry v. Holt (Colo.), 51 Pac. Rep. 1002; Jordan's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co., 89 Ky. 40, 11 S. W. Rep. 1013; Cincinnati, N. O. & T. P. Ry. Co. v. Adams (Ky.), 13 S. W. Rep. 428; Henderson's Adm'r v. Kentucky C. R. R. Co., 86 Ky. 389, 5 S. W. Rep. 875. And see also Strain v. Sweeney, 163 Ill. 603, 45 N. E. Rep. 201; Hartell v. Tefft (R. I.), 35 Atl.

Rep. 882; Reed v. Fidelity Trust & Safety Co. (Ky.), 44 S. W. Rep. 957.

⁴ Collins v. State, 97 Ga. 433, 25 S. E. Rep. 325.

⁵ Hoverson v. Noker, 60 Wis. 511, 19 N. W. Rep. 382; Dunks v. Gray, 3 Fed. Rep. 862; Strohl v. Levan, 39 Pa. St. 177; Shockley v. Shepherd, 9 Houst. (Del.) 270, 32 Atl. Rep. 173; Barker v. Morris, 33 Kan. 580, 7 Pac. Rep. 267; Tift v. Tift, 4 Denio, 175; Wilson v. Garrard, 59 Ill. 51.

was observed by the parent without objection on his part, the parent will be liable for the damages flowing from the negligent act of the child.¹ And where an infant who is forbidden by his father to have or use a gun, borrows a gun from another without the knowledge of the parent, with which the child negligently injures another, the parent is not liable for the wrong, for in such a case there is manifestly no culpable act of the parent.² But it is otherwise where the parent places a gun in the hands of his child well knowing him to be reckless with it.³

§ 441. **General rule of non-liability of parent for torts of child.**—A parent is not ordinarily liable to a stranger for the torts of his infant unless the child acts under the direction or with the sanction of the parent. There is certainly no general liability of the parent for the wrongs committed by his infant child, though the child at the time be living with his parents and rendering them customary domestic services. There is nothing in the requirement by the father of services at the hands of his infant child which can fasten a general liability on the parent for the torts of his child indiscriminately.⁴ Nor is there any reason in a rule which would make a parent unconditionally liable for every conceivable act of his child, whether the parent be in fault or not. So long, therefore, as the parent acts in good faith in using due care and prudence to prevent an injury to another by his child, he cannot be held responsible for acts of his child which are not to be expected or foreseen, or which could not be guarded against by the exercise of proper caution on the part of the parent. This being true, a parent is not liable for a tort committed by his child upon the property of another without his knowledge or sanction, even though

¹Strohl v. Levan, 89 Pa. St. 177; Pac. Rep. 851; Baker v. Morris, 33 Lashbrook v. Patten, 1 Duv. (Ky.) Kan. 580, 7 Pac. Rep. 267; Dunks v. Gray, 3 Fed. Rep. 862; M'Manus v. Crickett, 1 East, 106; Edwards v. Crume, 13 Kan. 348, 350; Baker v. Haldeman, 24 Mo. 219; Mcon v. Towers, 8 C. B. (N. S.) 611; Scott v. Watson, 46 Me. 362; Wilson v. Garrard, 59 Ill. 51; Tift v. Tift, 4 Denio, 175.

²Ritter v. Thibodeaux (Tex. Civ. App.), 41 S. W. Rep. 496.

³Johnson v. Glidden (S. D.), 76 N. W. Rep. 938.

⁴Paulin v. Howser, 63 Ill. 312; Chandler v. Deaton, 37 Tex. 406; Smith v. Davenport, 45 Kan. 423, 25

there be an oral promise on the part of the parent to pay. Such a contract is a *nudum pactum*, and not sufficient to authorize a recovery, as it is a promise to pay for that for which the parent is not morally or legally liable.¹ This rule proceeds upon the principle that the master is not liable for such acts of his servant.² The liability in all such cases is upon the child, for the law is supposed to afford a redress for every injury, no matter by whom committed.³

§ 442. Liability of parent for torts of child — Rule in cases of reckless conduct of child.— While the parent is generally liable for the acts of his child in the performance of a required duty, this liability does not extend to the reckless acts of the child which are not authorized or sanctioned by the parent. In such cases the infant alone is responsible for any injury accruing to another because of the recklessness;⁴ though the presumption of fact is, an infant is working in the capacity of a servant of his father in using any implements of industry adapted to the domestic service of the child to the father.⁵ Therefore, an infant who is permitted to ride his father's horse does not make his father liable for an injury resulting from the negligence of the child in running over another, where, at the time of the injury, the infant is not acting in his father's service.⁶ But if the facts are such as to lead to the conclusion that the parent had implied notice of the conduct or acts of the child in bringing about the injury, he will be liable.⁷

§ 443. Liability of parent for torts of child — Knowledge of — Question of fact.— Generally, the liability of a parent for the torts of his child must depend largely on whether the parent was, or should have been, cognizant of the fact which produced the injury. It will be one of fact where two intelligent conclusions might be reached. Whether the knowledge

¹ *Baker v. Morris*, 33 Kan. 580, 7 Pac. Rep. 267. *v. Noker*, 60 Wis. 511, 19 N. W. Rep. 382.

² *Paulin v. Howser*, 63 Ill. 312.

³ *Tifft v. Tifft*, 4 Denio, 175; *Chandler v. Deaton*, 37 Tex. 406; *Wilson v. Garrard*, 59 Ill. 51.

⁴ *Shockley v. Shepherd*, 9 Houst. (Del.) 270, 32 Atl. Rep. 173; *Hoverson*

⁵ *Gerhardt v. Swaty*, 57 Wis. 24, 14 N. W. Rep. 851; *Beedy v. Reding*, 16 Me. 362; *Smith v. Davenport*, 45 Kan. 423, 25 Pac. Rep. 851.

⁶ *Smith v. Davenport*, 45 Kan. 423, 25 Pac. Rep. 851.

⁷ *Beedy v. Reding*, 16 Me. 362.

of the parent, actual or constructive, did or did not exist must be gathered from the facts and circumstances of each case; and when these are such as would warrant a conclusion either way, the solution of the problem is to be made by leaving the question of fact for the intelligent determination of the court or jury trying the case.¹

§ 444. Liability of parent for necessities — Extent of.—

The limit of the liability of the parent for the necessities of his infant is, generally speaking, for such necessities only as are properly in keeping with the general ability and financial situation of the parent. Each case depends in a large measure upon the facts and circumstances surrounding it; but the duty to provide these goes no further. The parent, however wealthy, is under no legal obligation to furnish his child extravagant luxuries, nor fanciful or visionary things not really necessary and proper to a reasonable and sensible support.² Upon this principle it is correctly held that a parent is not liable to a tradesman who colludes with an infant and sells him goods at extravagant prices. No recovery can be had in such a case from the parent, though, had the goods been sold at a reasonable price, a liability would have arisen.³ Such conduct is in the nature of a fraud on the part of the tradesman, a lack of good faith which the law will not encourage, and entitles the actor to no consideration in a court of justice. But a tradesman who has been furnishing necessities to the child with the express sanction of the parent may recover for those thus furnished where the child has left his father, renounced his authority and forfeited his right to recover support from his parent, where the stranger so furnishing the goods has had no notice of such conduct in the child.⁴ In such cases the parent, in order to relieve himself of his continuing liability, must notify the tradesman to cease furnishing the necessities; otherwise the tradesman has the right to presume that the goods will be paid for.

¹ Beedy v. Reding, 16 Me. 362; Lashbrook v. Patten, 1 Duv. (Ky.) 316; Dunks v. Gray, 3 Fed. Rep. 862.

² Van Valkenburg v. Watson, 13 Johns. 480; 1 Bl. Comm. 449; Simp-

son v. Robertson, 1 Esp. 17; Ford v. Fothergill, 1 Esp. 211.

³ Simpson v. Robertson, 1 Esp. 17.

⁴ Murphy v. Ottenheimer, 84 Ill. 39.

§ 445. **Necessaries — When parent not liable for — Reason of the rule.**— A parent is not, as a general rule, liable for anything furnished his child against his will or without his consent. It is only when the parent improperly neglects to furnish the necessities of life that a third person may interfere, as it were, and do so at the expense of the parent. “The danger of encouraging children in idleness and disobedience, and of their being inveigled into expense by artful and designing persons, furnishes a sufficient reason for the rule.” Third persons have no right to interfere with the discretion which the parent exercises in providing for his child, unless that discretion is palpably abused or the duty to furnish necessities clearly violated.¹ And it is not sufficient, in order to charge a parent with liability for necessities furnished his infant child by a stranger, that they were furnished under circumstances which would lead a reasonable person to infer that the parent would pay; the circumstances, in the absence of an express agreement, must be such as necessarily imply that the parent will make payment.² In so furnishing supplies a tradesman must acquaint himself with the actual necessities of the infant at his peril. He must even see that no other tradesman has furnished same; for, though the parent or guardian may have been derelict in his duty to supply the necessities, yet if they have been properly supplied by another, no authority of law justifies the furnishing of additional necessities. Were the rule otherwise, there might be no end to the supplies an infant might buy when his parent fails to furnish them.³ And unless the omission of duty on the part of the parent to furnish the necessities be clear, a stranger will not be entitled to recover for those furnished by him.⁴ The law will not scan closely the duty of a parent in supplying his infant child with the necessities of life,

¹ Stanton v. Willson, 3 Day (Conn.), 37, 57; 2 Kent, Comm. 193; Van Valkenburg v. Watson, 13 Johns. 480; Mertimore v. Wright, 6 M. & W. 482; Miller v. McKinney, 45 Ill. App. 447; Johnson v. Lines, 6 Watts & S. (Pa.) 80; Bainbridge v. Pickering, 2 Wm. Bl. 1325; Judge v. Barrows, 57 Wis. 115, 17 N. W. Rep. 540; Tompkins v. Tompkins, 11 N. J. Eq. 512; Townsend v. Burnham, 33 N. H. 270; Schunckle

v. Bierman, 89 Ill. 454; Murphy v. Ottenheimer, 84 Ill. 39; Hunt v. Thompson, 3 Scam. (Ill.) 179; Gotts v. Clark, 78 Ill. 229; Tyler v. Arnold, 47 Mich. 564, 11 N. W. Rep. 387; Miller v. Davis, 49 Ill. App. 377.

² Miller v. Davis, 49 Ill. App. 377.

³ Johnson v. Lines, 6 Watts & S. (Pa.) 80.

⁴ Tompkins v. Tompkins, 11 N. J. Eq. 512.

for different persons might differ in their opinions of the duty of the parent in any particular case, and to subject a parent to the hazard of meeting the views of all persons concerning this duty to his child would be unreasonable. Unless, therefore, it is reasonably clear to any intelligent and fair-minded person that the parent has been derelict in his duty to properly provide for his child, no stranger will have the right to furnish the child any supplies and look to the parent for compensation.

§ 446. When parent not liable for necessities furnished by stranger.—A parent being able and willing to support his child and furnish him the necessities of life is not liable to another who furnishes same under these conditions. It is the right, duty and privilege of the parent to superintend and manage the furnishing of necessities for his child; and when a stranger furnishes same with the knowledge, express or implied, that the parent is properly complying with his duty, or doubtless without such knowledge,—for he must ascertain the necessity and propriety of the assistance necessary at his peril,—the undertaking will be voluntary, gratuitous and, in a sense, meddling, and such stranger will have no right of recovery against the parent;¹ though if the child absconds from his parent, seeks and obtains employment elsewhere, and is supported and cared for by such employer, the parent cannot recover the value of such services from the stranger without deducting, or offering to deduct, the cost of the support of the child during the time he so worked.² A parent especially is not liable for necessities furnished a child when he has furnished all that is proper or necessary himself.³

§ 447. Duty of parent to support—Necessaries—Education.—The duty of the parent to provide for his child is not performed by merely furnishing such clothing and food as is

¹ *Chilcot v. Trimble*, 13 Barb. 502; *Tompkins*, 11 N. J. Eq. 512; *Judge v. Gordon v. Potter*, 17 Vt. 348; *Kelly v. Barrows*, 59 Wis. 115, 17 N. W. Rep. 540; *Pidgin v. Cram*, 8 N. H. 350; *Davies*, 49 N. H. 187; *Filter v. Filter*, 33 Pa. St. 50; *Townsend v. Burnham*, 33 N. H. 270; *Blackley v. Laba*, 63 Iowa, 22, 18 N. W. Rep. 658; *Rogers v. Turner*, 59 Mo. 116; *Hunt v. Thompson*, 8 Scam. (Ill.) 179; *Cromwell v. Benjamin*, 41 Barb. 558; *Varney v. Young*, 11 Vt. 258.

² *Huttoon v. Hazleton*, 20 N. H. 388.

³ *Judge v. Barrows*, 59 Wis. 115, 17 N. W. Rep. 540.

necessary to keep away cold and hunger. The law requires a higher purpose than this, and enjoins, as part of the necessities of every child capable of receiving it, an education in keeping with the condition and circumstances of the parent.¹ Nor, indeed, is mere mechanical schooling sufficient. The parent should also take care that his child be taught the principles of culture, refinement, exalted ideas, manliness, honor, religion, virtue, temperance, prudence, and all the many familiar virtues and good qualities which go to make up the highest type of manhood and citizenship, as far as this is reasonably convenient. This latter duty, however, is more of a moral than a legal one.² But while the parent must educate his child as well as his means and ability will consistently permit, yet he will not be required to pay tuition for him when educational facilities in keeping with the standing and circumstances of the parent can be had in the public schools without charge.³ Nor will a parent, ordinarily, if at all, be required to set apart an undue proportion of his means in order to give his child a finished collegiate education. Such exceptional advantages are not included within the term "necessaries of an educational kind."⁴ For to poor people, indeed, they would be an unreasonable and improper burden.

§ 448. Necessaries — Medical attention as such.— Ordinarily anything is necessary for an infant which is required to keep him in health of body or mind. That the services of a physician are necessary when a child is sick to the extent that such services ought to be had goes without saying. It logically follows, therefore, that such attention, whenever a child is so sick as to need the same, is within the legitimate and well-recognized scope of the term "necessaries," and for such the parent in all proper cases is held to be liable, either where he directs the services rendered, or where, neglecting improperly to afford

¹ 1 Bl. Comm. 450; *Plaster v. Plaster*, 47 Ill. 290; *Middlebury College v. Chandler*, 16 Vt. 683; *Stanton v. Wilson*, 3 Day (Conn.), 37; *St. John's Parish v. Bronson*, 40 Conn. 75; *Reynolds' Estate v. Reynolds* (Ky.), 18 S. W. Rep. 517; *Bedford v. Bedford*, 32 Ill. App. 455, 26 N. E. Rep. 662; *Jennesse*

v. Emerson, 15 N. H. 486; *Louisville & N. Ry. Co. v. Willis*, 83 Ky. 57.

² See *Courtwright v. Courtwright*, 40 Mich. 633; *Lapworth v. Leach*, 79 Mich. 24, 44 N. W. Rep. 338.

³ *Plaster v. Plaster*, 47 Ill. 290.

⁴ *Middlebury College v. Chandler*, 16 Vt. 683.

his child such, they are furnished by a stranger, to the end that the child may not needlessly suffer or unnecessarily die.¹ It seems that a bill for dentistry incurred by a stranger for work on the teeth of an infant while temporarily staying with such third person cannot be charged to the parent because not immediately necessary. And the procuring such services by a stranger, when not urgent, is in a sense meddling with the right of the parent to choose and direct necessities for his child.² But no doubt the services of a dentist would, in a proper case, be considered as within the term "necessaries," when a neglect of such attention would seriously impair a child's teeth, which, in turn, would naturally tend to affect his health in some degree. Likewise, no doubt, would a proper bill of an oculist for necessary treatment of the eyes, or any other like necessities. For the care and preservation of all the organs and functions of the body are necessary and proper; and the fact that treatment may in some cases require the skill of a specialist does not make such services unnecessary or improper.

§ 449. Parent and child — Right of parent to control the furnishing of necessities for his children.—The parent is in duty bound to properly care for his children, and has the legal right to control and superintend the furnishing of necessities. He is burdened with their legitimate support, and this he must furnish to the extent necessary if he is able to do so. The furnishing of necessities is in no sense devolved upon strangers. They have no right to say when a child needs a thing and when he does not, so long as the father is ready, willing and able to furnish the necessities in keeping with his position in the world. When, therefore, a stranger seeks to recover from a parent for necessities furnished a minor, the burden is on him to show, not only that he has furnished the goods and that they were necessary for the child, but as well that the parent improperly failed, refused or neglected to furnish the same, and that it was necessary for such stranger to furnish them to avert injury to the child from want of same.³

¹ Nelson v. Ray, 17 N. Y. S. 500. ³ Conboy v. Howe, 59 Conn. 112, 23 Atl. Rep. 35; Johnson v. Lines, 6 Rep. 25; Rogers v. Turner, 59 Mo. 116. Watts & S. (Pa.) 80.

² Ketchum v. Marsland, 18 Misc. Rep. 450, 42 N. Y. S. 7.

The parent has the right, generally, to direct and judge of the quality and kind of necessities to be furnished his child, the time, amount, etc.; and in this matter no one has any right to interfere with his discretion so long as he does not abuse it to the injury of the child.¹ But a parent may ratify the act of a third party in furnishing his child necessities; and when this is done with a knowledge of all the facts, the parent will be liable, the same as though he had in the first instance bought them upon his own credit for the child.² He can of course ratify anything he could authorize in the first instance, and that he could authorize another to furnish necessities for his child and thereby become liable for the necessities furnished upon such authority goes without saying.

§ 450. Necessaries — Child living apart from parent — Liability of parent.— The liability of a parent for the care and support of his infant is fixed by law, and it makes no difference, so far as this liability for the necessities of the child within due bounds is concerned, whether the parent be rich or poor, or whether the child be living with him or not.³ This is true though the child is able to work and appropriates his wages to his own use, where the person furnishing the necessities is ignorant of the fact that by arrangement with his parent the minor was to have his earnings to his individual use.⁴ The law, in other words, does not favor the releasing of the parent from the duty to properly support and care for the child. The immature years of the child would make it an easy matter for the parent to make some arrangement with him by reason of this lack of maturity, coupled with the natural sway which the parent ordinarily possesses over his child, whereby he would be enabled to devise some plan of emancipation or manumission, either partial or complete, by which the parent might be enabled to shirk this salient and vital responsibility. But, as a rule, so long as the child does not repudiate the dominion of the parent, but remains subject to lawful control,

¹ *Finch v. Finch*, 22 Conn. 411, 415; *Cooper v. McNamara*, 92 Iowa, 243, 60 N. W. Rep. 522; *Judge v. Barrows*, 59 Wis. 115, 17 N. W. Rep. 540.

² *Conboy v. Howe*, 59 Conn. 112, 22 Atl. Rep. 35. ⁴ *Cooper v. McNamara*, 92 Iowa, 243, 60 N. W. Rep. 522; *Porter v. Powell*,

³ *Garland v. Dover*, 19 Me. 441; 79 Iowa, 151, 44 N. W. Rep. 295.

the correlative duty of the parent to furnish the child necessities exists.

§ 451. Right of the father over the estate of his infant.— At common law the father had a right to recover, in a trust capacity, any funds or property which might be coming to his infant child; but he must faithfully preserve same, and will be held to account to the infant therefor when he arrives at the age of majority.¹ The father, or, in the event of his death, the mother, ordinarily has the right to the possession of the property of infant children to the exclusion of strangers;² but neither the father nor mother has any right — at least in the absence of overpowering necessity — to use any property belonging to the estate of his or her infant child towards its support. That the child has property by no means relieves the parents of their duty to support it.³ And the father having no such right, the mother, who becomes the natural guardian of her children upon the death of the father, has no greater right in this respect than he would have if living.⁴ As the father has no actual right to the estate of his child except to duly care for and protect such as may come to his hands as the natural guardian of his infant, he certainly has no right to dispose of or in any way convert it; and, if he should do so, he would become thereby a tortfeasor, and liable to the infant for the conversion of the property which he may have held in the right of the infant as a trustee.⁵ He cannot claim the property of the infant in an action to recover same by replevin in his own name, but must do so as the guardian by nature or in some other trust capacity.⁶ It has been held that a parent has no such estate in the photograph or portrait of his child as will entitle him to an injunction against its publication, nor, of course, for damages because

¹ 1 BL Comm. 453; 2 Kent, Comm. 191; Atkins v. Guice, 21 Ark. 164.

And see further Town of Ettrick v. Town of Bangor, 84 Wis. 256, 54 N. W. Rep. 256.

² Rhodes v. McNulty, 52 Mo. App. 301.

³ Moore v. Moore (Tex. Civ. App.), 31 S. W. Rep. 532; Linskie v. Kerr (Tex. Civ. App.), 34 S. W. Rep. 765;

Hyde v. Stone, 7 Wend. 354; Fonda v. Van Horne, 15 Wend. 631.

⁴ Sparkman v. Roberts, 61 Ark. 26, 31 S. W. Rep. 742.

⁵ Hyde v. Stone, 7 Wend. 354; Francisco v. Benepe, 6 Mont. 243, 11 Pac. Rep. 637; Fonda v. Van Horne, 15 Wend. 631.

⁶ Rhodes v. McNulty, 52 Mo. App. 301.

of the publication.¹ There is, in such case, no right of action for outraged sensibilities arising from the act of publication,² for such damages must rest upon the right of the parent to control such publication, and this the law does not give him.

§ 452. Right of parent to deal with or purchase property of child.—The parent occupies a confidential relation to the child. He further exercises a great sway over his infant from the natural condition of things. His parental authority and dominion well enable him to take an unfair advantage of his child in dealing with the property rights of the infant. For these and like reasons, the law watches with a jealous and scrutinizing eye all transactions by a parent affecting the property of the child. The parent is forbidden, therefore, to speculate in the property of his infant or to deal with it in any way, as by purchase or otherwise, which would or might operate to the prejudice of the property rights of the child. And whenever he does so, the law holds him to a strict accountability.³ This rule arises out of necessity, in one sense; at least, the object of the law is to protect the interests of the child from imposition by any who may stand in a confidential relation, and it must be admitted that none stand in a more confidential relation to an infant than his natural parents. And were they permitted to buy or speculate with the infant's property, great opportunities would be opened for fraud upon the rights of the child whenever the parent might be so base as to take advantage of his relation to control the property of the child in a way by reason of which an advantage might result to the parent and injury to the child. In fact, the law will not permit such dealing though it be shown that it be for the advantage of the child. It will not, in other words, lay the temptation in the way of the parent. It is forbidden on the broad and comprehensive ground of public policy. So, a sale of the property of an infant by his parent, who has not been appointed guardian nor authorized to make the sale, will not pass any title of the in-

¹ *Murray v. Gast L. & E. Co.*, 28 N. S. W. Rep. 1059; *Gibson v. Herriott*, Y. S. 271, 8 Misc. Rep. 36. 55 Ark. 85, 17 S. W. Rep. 589; *Hind-*

² *Murray v. Gast L. & E. Co.*, 28 N. S. W. Rep. 1052. *man v. O'Connor*, 54 Ark. 627, 16 S. Y. S. 271, 8 Misc. Rep. 36.

³ *Thomas v. Syper*, 61 Ark. 575, 33

fant nor in any way affect his interest in the thing attempted to be sold.¹

§ 453. Right of parent to become interested in property of child—Rule pertaining to step-father and step-child.—It is true a parent may not deal with the property of his natural child whereby an advantage accrues to himself or an injury results to the child. But this rule does not obtain where the child is not related by blood, but by affinity only, as being the child of the wife by a former husband. As to such child the step-father is a stranger, and may deal with his property as he might do with that of third persons in general.² But where the step-child is living in the family of the step-father as a member thereof, and as any other child, the rule is different, and the step-father can then no more traffic in nor speculate with the property of his step-child than he could with that of his own natural offspring, for then, as to such child, he stands *in loco parentis*, and his confidential relation to such child precludes him from the right to have any advantage in either a sale, purchase, or other transaction with reference to the property of his step-child.³ And a son to whom his parents have turned over all their property as a consideration for support at his hands in their old age, though all parties are *sui juris*, occupies such confidential relation towards them as to preclude him from dealing with their property to their disadvantage.⁴ This is because the law forbids any one to carry out or perform a trust of any kind where the doing so would conflict with the interest of the trustee. And this rule is established, not so much because it is supposed that any would perpetrate a fraud or violate a trust, but because this might be the case, even though, perchance, unconsciously to the offender. It is thought best to remove the possibility of such misconduct rather than risk the vital rights of others in a contest with duty and self-interest.

§ 454. Adoption—Common law concerning.—The common law recognized no mode of procedure whereby one might adopt

¹ Wear & Bougher Dry Goods Co. S. W. Rep. 1059; Otto v Schlappkahl, v. Smith (Ark.), 49 S. W. Rep. 493. 57 Iowa, 226, 10 N. W. Rep. 651.

² Otto v Schlappkahl, 57 Iowa, 226, 10 N. W. Rep. 651. ⁴ Bowe v. Bowe, 42 Mich. 195, 3 N. W. Rep. 537.

³ Thomas v. Syper, 61 Ark. 575, 33

the child of another so as to make the child adopted an heir of the person adopting. A child was the heir, as a lineal descendant of only his actual parents, and could not inherit from any one in the descending line except as an immediate or remote child of the ancestor. A child, in other words, could never inherit at common law except as a relation by blood, and proceedings whereby persons might be adopted so as to have the full rights of inheritance of natural children, though in fact strangers in blood, were unknown at common law.¹

§ 455. Adoption — When and how status of adopted child is fixed.—The status of a child adopted under statutes authorizing the adoption is generally deemed to be fixed and complete at the time the adoption is consummated. The act of adoption, being regular and in compliance with the law, changes, *ipso facto*, the child into an heir and nominal child of the adopting parents. The child thus adopted stands, as to the property rights of the new parent, just where a child born in lawful wedlock would, save in so far only as the exceptions of the law authorizing the adoption otherwise declare.² The right of service in the natural parent, if living at the time of the adoption, together with all other dominion and authority which such natural parent could, but for the adoption, assert, cease the instant the adoption is perfected, and the child thereafter owes the duties of such to those who thus stand in the new relation to him.

§ 456. Adoption — Status of adopted child — Right of inheritance.—The adoption of a stranger by any one under any of the different statutory provisions relating to the subject of adoption confers upon the child adopted a new status with reference to his new parent, and usually changes the right of inheritance; and this new status is brought about by operation of law when the requirements of the statute are complied with

¹ *Luppie v. Winans*, 87 N. J. Eq. 245, 250; *Humphries v. Davis*, 100 Ind. 274, 276; *Ross v. Ross*, 129 Mass. 243, 262; *Krug v. Davis*, 87 Ind. 590, 592; *Ballard v. Ward*, 89 Pa. St. 358; *Power v. Hafley*, 85 Ky. 671, 4 S. W. Rep. 683; *Wagner v. Varner*, 50 Iowa, 533; *Humphries v. Davis*, 100 Ind. 280; *Barnes v. Allen*, 25 Ind. 222; *Power v. Hafley*, 85 Ky. 671, 4 S. W. Rep. 683; *Eckford v. Knox*, 67 Tex. 200, 2 S. W. Rep. 372; *Markover v. Cross*, 132 Ind. 294, 31 N. E. Rep. 1047; *Isenhour v. Isenhour*, 52 Ind. 328.

² *Burrage v. Briggs*, 120 Mass. 103;

regularly.¹ The child thus adopted must, generally speaking, serve his new parents as a natural child would be required to do, and a new parent of this kind may recover from another for services rendered by his adopted child during minority and after the adoption had been duly perfected.² But where the statute requires anything to be done by one or both parents adopting, as the case may be, there is neither any right nor duty of service, nor right of inheritance, until all things required to be done are complied with.³ So, where one adopting a child died before he completed all the requirements, it was held that there was no right of inheritance, though there would have been had the statute been complied with, and though it was through no fault of the child that the requirements were not completed.⁴ But where the statute requires that both husband and wife join in a petition to adopt a child, if the petitioner be married, it is not necessary that both actually sign the petition, but it is sufficient if both ask the adoption and properly bring themselves into court.⁵ These statutes creating a new right of inheritance in the adopted child are held not to change the general law of descent further than is absolutely necessary to give effect to such enactments.⁶ And of course the legislative authority cannot change the order of nature so as to make an adopted child a natural one in fact, no matter what filial rights of descent may be conferred upon the child, nor what obligations and duties are imposed.⁷ A married man whose former wife and children are dead, who adopts a child under statutory authority and afterwards marries, does not thereby confer upon the adopted child the rights of a natural child or heir as to the second wife, though had both husband and wife been parties to the adoption proceedings such would have been the result.⁸ In such cases, the husband dying, the adopted child will inherit from him in like manner and to the same effect a natural child of the husband by the first wife would have done.⁹ The Indiana statute here referred to au-

¹ *Brown v. Brown*, 101 Ind. 340.

² *Lunay v. Vantyne*, 40 Vt. 501, 504;
Humphries v. Davis, 100 Ind. 274, 278.

³ *Shearer v. Weaver*, 56 Iowa, 578, 9
N. W. Rep. 907.

⁴ *Shearer v. Weaver*, 56 Iowa, 578, 9
N. W. Rep. 907.

⁵ *Bland v. Gollaher* (Tenn. Ch. App.),
48 S. W. Rep. 320.

⁶ *Humphries v. Davis*, 100 Ind. 274.

⁷ *Isenhour v. Isenhour*, 52 Ind. 328,
329.

⁸ *Isenhour v. Isenhour*, 52 Ind. 328.

⁹ *Isenhour v. Isenhour*, 52 Ind. 328.

thorizes the adoption of a strange child by either the husband or husband and wife jointly. When the adoption is by joint proceedings the child becomes the heir of both; when he is adopted by only one, he is a stranger to the other.¹ Where a man and wife jointly adopted a child under this statute, after which the wife died, and the child, who by virtue of his status created by the adoption inherits from the wife and afterwards dies, the adopting father was held to then inherit from the child to the exclusion of its natural mother.² The adoption of a child as an heir under statutory authority, by virtue of which he becomes an heir at law of his new parents, does not relieve him from the payment of a collateral inheritance tax.³ Under the Roman law, from which the law of Louisiana is taken in large part, an adopted person "entered into the family and came under the power of the person adopting him, and the effect was such that the person adopted stood not only himself in the relation of child to him adopting, but his children became grandchildren of such."⁴ A statute of adoption providing "that such child shall assume the name of the adopting parent and have all the rights of a child and heir of such adopting parent" makes the child regularly adopted by virtue of this law an heir of the new parent in the full sense of the word, and he will take by descent, to the exclusion of all collateral heirs, all property which a natural child would inherit.⁵ Where one adopts his grandchild, such adopted child will inherit equally with the immediate children. And such adopted child will also inherit the portion of such estate that would fall to his natural parent when such parent dies before the parent adopting the grandchild.⁶ And when there are other children to inherit, the adopted child, being the grandchild of the adopt-

¹ Barnhizel v. Ferrell, 47 Ind. 335; Barnes v. Allen, 25 Ind. 522.

² Humphries v. Davis, 100 Ind. 274. The reader will find this a very interesting and well-reasoned case. The learned court reviews a number of authorities and thoroughly and intelligently discusses the question before it. See, too, as instructive, Paul v. Davis, 100 Ind. 422. And see, apparently *contra*, Reinders v. Koppelman, 68 Mo. 482.

³ Commonwealth v. Nancrede, 32 Pa. St. 389.

⁴ Vidal v. Commagere, 13 La. Ann. 517; Reinders v. Koppelman, 68 Mo. 482, 496.

⁵ Johnson's Appeal, 83 Pa. St. 346; Rowan's Estate, 132 Pa. St. 299, 19 Atl. Rep. 82; Vidal v. Commagere, 13 La. Ann. 517; Power v. Hatley, 85 Ky. 671, 4 S. W. Rep. 683.

⁶ Wagner v. Varner, 50 Iowa, 532. This ruling is under a statute provid-

ing parent, will inherit equally with the natural children, and if he die, his children will inherit what he would have succeeded to.¹

§ 457. Statutory provisions pertaining to adoption must be strictly followed.—In many of the states there exist statutes, differing more or less from each other, authorizing the adoption, in certain instances, of children under the age of majority, and when this is done the child becomes an heir of the *quasi*-parent adopting him, with more or less extended privileges and rights of inheritance. These provisions of the various statutes being unknown to the common law, and being an invasion of the principles of the old law, in order to be effective must be strictly followed and carried out.² So, where an instrument adopting a child is required by statute to be signed, acknowledged and filed for record, it is not sufficient that it be regularly executed, signed and delivered. It must also be filed.³ But while all the statutory requirements must be complied with and none omitted, and all must be followed as laid down by statute, yet, when complied with in all features and requirements in a substantial manner, it has been held that this will be sufficient.⁴ Statutes of this kind do not authorize inheritance by the parents adopting the child unless they so expressly provide. This is true, though the child be made an heir to such parents in the full sense of the term, so that it may inherit from the adopting parent to the same effect a natural child might.⁵ In such cases the natural parents of the adopted

ing that, when children are adopted as required, "the rights, duties and relation between the parent and child by adoption shall, in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth."

¹ Power v. Hasley, 85 Ky. 671, 4 S. W. Rep. 683.

² Durkee v. Durkee, 59 Vt. 70. 8 Atl. Rep. 490; Hindman v. O'Connor, 54 Ark. 627, 16 S. W. Rep. 1052; Burger v. Frakes, 67 Iowa, 460, 23 N. W. Rep. 746; Foley v. Foley, 61 Ill. App. 577; Morris v. Dooley, 59 Ark. 483, 28 S. W. Rep. 30, 430; Luppie v. Winans,

37 N. J. Eq. 245; Shearer v. Weaver, 56 Iowa, 578, 9 N. W. Rep. 907; Keegan v. Geraghty, 101 Ill. 26; McCollister v. Yard, 90 Iowa, 621, 57 N. W. Rep. 447.

³ Tyler v. Reynolds, 53 Iowa, 146, 4 N. W. Rep. 902.

⁴ Nugent v. Powell (Wyo.), 83 Pac. Rep. 23. See along the same line, and as illustrative of this theory, In re John's Estate, 98 Cal. 531, 33 Pac. Rep. 460; Fosburg v. Rogers, 114 Mo. 122, 21 S. W. Rep. 82; Renz v. Drury, 57 Kan. 84, 45 Pac. Rep. 71.

⁵ Hole v. Robbins, 53 Wis. 514, 10 N. W. Rep. 617.

child, if living, will inherit property descending to such child to the exclusion of the parents who have adopted him.¹ When a child is regularly adopted according to the terms of the statute, he becomes an heir of the adopting parent in the full sense of the word, where the adoption statute provides that he have such a status upon compliance with its provisions; and he can then inherit, not only directly from the new parents, as a natural heir, but indirectly and collaterally as well, where natural children might.² Unless it is required by statute, the consent of the parent of the child adopted is not necessary, and it may inherit from the new parents when adopted without the consent of the natural parents, when all the requirements of the statute of adoption have been fully and regularly complied with.³ It is held in a recent case that, so far as these statutes operate for the advantage or benefit of the child, they should receive a liberal construction, to the end that their object in benefiting infants may not fail.⁴

§ 458. Adoption — Statutes authorizing — Requirement of consent in writing.— Sometimes statutes authorizing the adoption of infants, as a precaution against abuse and to insure good faith, require that the consent of the parent or guardian, and sometimes that of the child to be adopted, also, be had in writing. The consent of the child is usually required only when he shall have arrived at an age at which it is supposed he has some reasonable discretion, and is usually at about the age of fourteen. Under a statute, therefore, which requires the written consent of the child to the adoption, if he be fourteen years old or over, as well as that of the parent or parents, if living; but if both be dead or unknown, or hopelessly intemperate or insane, or shall have abandoned the child, written

¹ *Barnhizel v. Terrill*, 47 Ind. 335; *Schafer v. Eneu*, 54 Pa. St. 304. And *vide Commonwealth v. Nancrede*, 32 Pa. St. 389.

² *Schafer v. Eneu*, 54 Pa. St. 304; *Barnes v. Allen*, 25 Ind. 222; *Moore v. Estate of Moore*, 35 Vt. 98; *Stanley v. Chandler*, 53 Vt. 619, 625; *Humphrey v. Davis*, 100 Ind. 274; *Sewall v. Roberts*, 115 Mass. 262; *Wagner v.*

Varner, 50 Iowa, 532; *Hole v. Robbins*, 53 Wis. 514, 10 N. W. Rep. 617. And see also *Burrage v. Briggs*, 120 Mass. 103.

³ *Reinders v. Kopplemann*, 68 Mo. 482; *In re Clements*, 78 Mo. 352; *Clarkson v. Hatton (Mo.)*, 44 S. W. Rep. 761.

⁴ *Parsons v. Parsons (Wis.)*, 77 N. W. Rep. 147.

consent of the statutory guardian is requisite, or, in the absence of such guardian, that of some competent and suitable person appointed by the court,—there is no right of adoption of a child under fourteen, the statute being silent as to children younger than this. Nor even though over fourteen can a child be adopted where, though the father is dead, the mother is known to be living, in possession of her faculties, and a suitable person for the care and custody of him.¹ But though the statutory proceedings be irregular or otherwise vulnerable to attack, yet a petition to annul or set aside same will not be entertained after such a length of time as will amount to laches.² And the proceedings of adoption cannot be annulled in a collateral action where the court trying the same has jurisdiction of the subject-matter and the parties, but must be set aside, if at all, in a direct proceeding for the purpose.³ If it be required by statute that the consent of the parent be first had before the adoption proceedings will be legal, and such consent is obtained upon the promise and assurance of the adopting parent that the child, when adopted, shall have all the rights of an heir, such new parent having thus procured the necessary consent cannot dispose of his property by will or other conveyance with the intent or to the necessary effect of fraudulently depriving such adopted child of his right of inheritance.⁴ The value of the services of the child so adopted, and the divers rights acquired by the *quasi*-parent over the child, constitute a good and sufficient consideration for the agreement to allot the property to the child adopted.

§ 459. Adoption — Statute of frauds.— Though an agreement to adopt a child and support him during infancy would ordinarily be understood to extend through a period of years, yet such undertakings are not within the statute of frauds though not in writing. This is upon the familiar rule that an agreement which may, under some possibilities, be performed within a year is not within the statute.⁵ Of course, if there

¹ Luppie v. Winans, 37 N. J. Eq. 243. Quinn v. Quinn, 5 S. D. 328, 56 N.

² Brown v. Brown, 101 Ind. 340. W. Rep. 803; Taylor v. Deseve, 81

³ Brown v. Brown, 101 Ind. 340. Tex. 246, 16 S. W. Rep. 1008; Sharkey

⁴ Quinn v. Quinn, 5 S. D. 328, 58 N. W. Rep. 808. v. McDermott, 91 Mo. 647, 4 S. W. Rep. 107. And see, to like effect, Mc-

⁵ Sutton v. Hayden, 62 Mo. 101; Pherson v. Cox, 96 U. S. 404; Fenton

has been such a part performance as will defeat the operation of the statute of frauds, the agreement of adoption may be specifically enforced by the child when he has complied with the terms thereof on his part.¹ So where a man and wife agreed to adopt a child and thereby make her their heir, and upon the faith of this agreement the child went with them and worked for them as a child and servant for many years, and gave them all her earnings until the husband died, having bequeathed all his property to his wife, who also died in a short time without making any will, it was held that the agreement was binding on the parents though they had never formally perfected the adoption of the child, and that she might maintain an action against the heirs at law of the husband and wife for the specific performance of the contract.² But where foster parents upon adopting a child agree with it that they will leave it at their death, or convey to it during their lives, in consideration of the benefits to be derived by them from the adoption, certain lands or realty of any kind, the contract cannot be enforced by the child unless, in pursuance of the arrangement, the child is put in possession or there is, on its part, some part performance recognized by law as sufficient to take a contract for an estate in lands out of the statute of frauds.³ When an agreement of this kind cannot be enforced because within the inhibition of the statute of frauds, however, and where the child has rendered valuable services according to her agreement in good faith, a recovery on a *quantum meruit* for the value of the services rendered may be had.⁴

v. Emblers, 8 Burr. 1278; *Railway Co. v. Whitley*, 54 Ark. 199, 15 S. W. Rep. 465; *Gupton v. Gupton*, 47 Mo. 37; *West v. Bundy*, 78 Mo. 407; *Sweet v. Desha Lumber Co.*, 56 Ark. 629, 20 S. W. Rep. 514; *Russell v. Slade*, 12 Conn. 460; *Lawrence v. Cook*, 56 Me. 187; *Artcher v. Zeh*, 5 Hill, 200; *Ellcott v. Peterson*, 4 Md. 476, 487; *Plimpton v. Curtiss*, 15 Wend. 336; *Jilson v. Gilbert*, 26 Wis. 637; *Rogers v. Brightman*, 10 Wis. 55, 65; *Peters v. Westboro*, 19 Pick. (Mass.) 364; *Blair Town Lot Co. v. Walker*, 39 Iowa, 403.

¹ *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. Rep. 107; *Anderson v. Shock-*

ley, 82 Mo. 250; *Gupton v. Gupton*, 47 Mo. 37.

² *Sharkey v. McDermott*, 91 Mo. 547, 4 S. W. Rep. 107. The following cases will also be found to sustain the same contention: *Van Tine v. Van Tine* (N. J. Eq.), 15 Atl. Rep. 249; *Wright v. Wright*, 99 Mich. 170, 58 N. W. Rep. 54; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370.

³ *Wallace v. Long*, 105 Ind. 522, 5 N. E. Rep. 666; *Ballard v. Ward*, 89 Pa. St. 358. *Vide* also, as illustrating the proposition, *Mauck v. Melton*, 64 Ind. 414.

⁴ *Wallace v. Long*, 105 Ind. 522, 5 N. E. Rep. 666.

§ 460. Adoption—Status of adopted child—Conflict of laws. The statutes authorizing the adoption of children, whereby they become heirs of the persons adopting them, are usually held to have no extra-territorial force or effect. So children thus adopted may usually inherit property in the state, only where the local laws have authorized the adoption. The law of the descent of property in a foreign state is governed by the laws in force in that state, not those of the state where the child lives or is adopted.¹ But if the laws of the foreign state, where the property to be inherited is situated, should authorize the adoption of children in a similar manner, and with like effect, to that authorized by the laws of the state where the status of the child arises and becomes effective by virtue of the adoption statutes, the child may inherit the property in the foreign state the same as in that of the state of his domicile. For in such cases there would be little or no repugnancy between the laws of the two states, and the foreign state will not have surrendered any attributes of sovereignty by permitting the child to inherit property situated therein.² In Indiana the statute provides that, upon the filing of an authenticated transcript in a circuit court of that state of the proceedings by adoption in another state under the local laws of such state, the child adopted in the foreign state becomes entitled to all the rights of inheritance, as well as all other rights, privileges and benefits incident to the adoption, which the child adopted might enjoy in the state where the proceedings were had.³ The rights of children adopted in other states are therefore recognized when this requirement of the statute of Indiana is complied with, whether the adoption law of the foreign state be similar to that of Indiana or not.

§ 461. Statutes authorizing adoption of children — Constitutionality of.—To the extent that the adoption of an infant under any of the statutes authorizing such a proceeding

¹ *Keegan v. Geraghty*, 101 Ill. 26; *Pac. Rep.* 596; *Melvin v. Martin*, 18 In re *Sunderland*, 60 Iowa, 732, 13 N. R. L. 650, 30 Atl. Rep. 467; *Keegan v. W. Rep.* 655. But see, apparently *Geraghty*, 101 Ill. 26; *Gloss v. Sankey*, *contra*, *Barnard v. Barnard*, 119 Ill. 148 Ill. 536, 36 N. E. Rep. 628.
² 92, 9 N. E. Rep. 320; *Ross v. Ross*, 129 Mass. 243.
³ *Rev. St. Ind.* 1881, § 829; *Markover v. Cross*, 132 Ind. 294, 31 N. E. Rep.

² *Gray v. Holmes*, 57 Kan. 217, 45 1047.

would interfere with or cut off a vested right existing at the time of the passage of the statute, there can be no doubt that such a statute could not withstand an attack upon the ground of unconstitutionality.¹ But they may operate to change the descent of property at any time before the right of inheritance is permanently fixed as a vested right. Necessarily these statutes authorizing adopted children to inherit equally and to the same extent that natural heirs could, have the effect of invading the right of inheritance, to a certain extent, of natural children, by creating another heir with whom the property must be shared, and who becomes entitled to share equally with other heirs, whether created by consanguineous relation or otherwise. Such a right is not vulnerable to constitutional objection, for, in cases of this and like kind, no vested right is infringed.² Rights under the law must generally be asserted by virtue of the law in force at the time the right accrued, and not by virtue of some law which may have been in force at some prior time. The legislature may change any rights ordinarily which may be contingent in their nature. And when the contingent right or interest is changed or taken away by legislative action before becoming fixed or vested by operation of law, it cannot be insisted upon or enforced, as the law making the change supplants the prior rule of property.³

§ 462. Adoption — Adult children.— The statutes touching the subject of adoption of children are never construed to embrace adult children. These may be, and are, children in a sense. As such, they inherit, whether of age or infants. But when the law permits the adoption of a child, the word is never construed to include those who have arrived at majority, for the liabilities and duties of children to their parents from a legal standpoint have reference only to those who are under age. There is no legal duty to serve on the part of an adult child. Neither the natural nor adopting parent has any right to control the acts or custody of the full-grown child, or demand filial services of him. Nor can either fix the domicile of such a child. The legislature, therefore, is never presumed

¹ Ballard v. Ward, 89 Pa. St. 358.

³ Sidway v. Lawson, 58 Ark. 117, 23

² Sewall v. Roberts, 115 Mass. 262; S. W. Rep. 648.
Wagner v. Varner, 50 Iowa, 532.

to have in view a person who has become emancipated, by operation of law, from all duty to his parents under the law when it speaks of the adoption of children.¹

§ 463. Adoption — Right of parent to inherit from adopted child.— As statutes conferring the rights, duties and liabilities of natural children upon those adopted thereunder are in derogation of the common law, they must not be construed to enlarge or confer any rights not clearly given. Upon principle, therefore, it is clear that an adopting parent could not inherit from an adopted child unless this be clearly authorized by the statute. Indeed, out of an abundance of caution, the statutes on the subject in some states expressly provide that the adopting parent shall not inherit from the child adopted. This is done to prevent designing persons from getting the estate of a child through the process of adoption. It would be to the interest, from a financial standpoint, of a *quasi*-parent, who has adopted a child being an heir to a fortune, large or small, and who has no descendants who could take the inheritance in preference to a parent, to bring about the death of the child for the purpose of succeeding to the inheritance. Under such a condition of things, the *quasi*-parent might neglect the child in sickness or otherwise, be the means, directly or indirectly, of bringing about the death of the adopted child. For these and like reasons, the doctrine of ascent of property from an adopted child to its new parents is not, and should not, be favored in law. But where the statute provides that "should such adopted child die intestate, without leaving wife or husband, issue or their descendants surviving him or her, seized of any real estate or owning any personal property which may have come to such child by gift, devise or descent from such adopted father or mother, such property so coming to such adopted child shall, on its death, descend to the heirs of said adopting father or mother the same as if such child had never been adopted," property thus coming to the adopted child will descend to its adopting parents rather than to its natural mother,

¹ Moore, *Ex parte*, 14 R. I. 38; Abner 18 R. I. 333, 27 Atl. Rep. 210. See, *v. DeLoach*, 84 Ala. 393, 4 S. Rep. 757; too, *McCollister v. Yard*, 90 Iowa, 621, *Buckley v. Frazier*, 153 Mass. 525, 27 57 N. W. Rep. 447. N. E. Rep. 768; *Williams v. Knight*,

where there are no other heirs to take under the provision of the statute.¹

§ 464. **Right of parent to earnings of child.**—As the law enjoins upon the parent the responsibility and duty of properly caring for, educating, clothing and maintaining the infant child, it at the same time gives to the parent as a counter advantage the right to all the earnings of his child.² This rule extends to cases where the parent receives into his family a child of his second wife, or adopts an orphan, or in fact where he so receives a child into his family in any of the many various commonplace ways in which this is practiced. In all such cases the parent has a right to the services of the child, and on the other hand is charged in law with the duty of supporting and caring properly for the child. This being true, the parent cannot charge the child for the ordinary necessities of life and support generally, nor can the child recover from his foster parent for the value of his domestic services.³ The parent may maintain an action against another who employs his in-

¹ Davis v. Krug, 95 Ind. 1.

² Jennison v. Graves, 2 Blackf. (Ind.) 440; Bell v. Hallenback, Wright (Ohio), 751; Cann v. Cann, 40 W. Va. 138, 20 S. E. Rep. 910; 1 Bl. Comm. 453; Watson v. Murray, 54 Ark. 499, 16 S. W. Rep. 293; Bobo v. Bryson, 21 Ark. 387, 389; Fairhurst v. Lewis, 23 Ark. 435, 438, 439; Taylor v. Chesapeake & O. Ry. Co., 41 W. Va. 704, 24 S. W. Rep. 631; Allen v. Allen, 60 Mich. 635, 27 N. W. Rep. 702; Schuster v. Bauman Jewelry Co., 79 Tex. 183, 15 S. W. Rep. 259; Railroad Co. v. Willis, 83 Ky. 57; Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. Rep. 570; Benson v. Remington, 2 Mass. 113; Nightingale v. Withington, 15 Mass. 272; Dye v. Kerr, 15 Barb. 444; Halliday v. Miller, 29 W. Va. 424, 1 S. E. Rep. 821; Keen v. Sprague, 3 Greenl. (Me.) 77; Plummer v. Webb, 4 Mason (C. C.), 380; Emery v. Gowen, 4 Greenl. (Me.) 33; Gale v. Parrott, 1 N. H. 28; The L. B. Snow, 15 Fed. Rep. 282; The Hattie Low, 14 Fed. Rep. 880; The

David Faust, 1 Ben. 183; Luscom v. Osgood, 1 Spr. 82; Cutting v. Seabury, 1 Spr. 522.

³ Doan v. Dow, 8 Ind. App. 324, 35 N. E. Rep. 709; Croxton v. Foreman, 13 Ind. App. 442; Marquess v. La Baw, 82 Ind. 550; Smith v. Denman, 48 Ind. 65; Gerdes v. Weisner, 54 Iowa, 591, 7 N. W. Rep. 42; James v. Gillen, 3 Ind. App. 472, 13 N. E. Rep. 7; Davis v. Davis, 85 Ind. 157; Hays v. McConnell, 42 Ind. 285; Thorpe v. Bateman, 37 Mich. 68; Lockwood v. Robbins, 125 Ind. 398, 25 N. E. Rep. 455; Weir v. Weir, 3 B. Mon. (Ky.) 645; Wyley v. Bull, 41 Kan. 206, 20 Pac. Rep. 855; Williams v. Hutchinson, 3 N. Y. 312; Starkie v. Perry, 71 Cal. 495, 12 Pac. Rep. 508; Greenwell v. Greenwell, 26 Kan. 675; Ensey v. Hines, 30 Kan. 704, 2 Pac. Rep. 861; Shane v. Smith, 37 Kan. 55, 14 Pac. Rep. 477; Brown's Appeal, 112 Pa. St. 18, 5 Atl. Rep. 13; Gerber v. Bauerline, 17 Oreg. 115, 19 Pac. Rep. 849.

fant, though the child be away from home, and the father be ignorant of the employment until after the services are rendered.¹ In such cases the parent's right of recovery is based on the actual value of the services of the child, not upon the contract made by the child and third party.² But where the parent and child enter into a contract with another at a stipulated price, the infant cannot repudiate the agreement and recover a *quantum meruit*, though by the agreement the child was to have and enjoy his own wages.³ The parent having the right to the services of his infant may hire him to another for a period not extending beyond the minority of the child and receive the wages for such service.⁴ And when he does so, the parent may maintain an action in his own name for such earnings;⁵ for these are payable to the parent, not to the child.

§ 465. Services—Right of child to military or other bounty.—Generally speaking, a prize or bounty due an apprentice or infant for peculiar personal service, such as military duty and other like extraordinary services, is personal to the infant. Such services are distinguished from the earnings of an infant in the ordinary industrial vocations or domestic services generally. They are in the nature of a special duty, and call for special and personal as well as individual remuneration. The infant, therefore, has the personal right to recover for such duty, and, if suit be necessary to assert a right of recovery, he is the proper party to sue, either through the medium of a *prochein ami* or other manner provided by law for suits by infants.⁶ The theory of the law is that in this extraordinary duty

¹ *Plummer v. Webb*, 4 Mason (C. C.), 380; *Keen v. Sprague*, 3 Greenl. (Me.) 77; *Halliday v. Miller*, 29 W. Va. 424, 1 S. E. Rep. 821; *Monaghan v. School District*, 38 Wis. 104; *Weeks v. Holmes*, 12 Cush. (Mass.) 215.

² *Gale v. Parrott*, 1 N. H. 28; *Bishop v. Shepherd*, 23 Pick. (Mass.) 492; *Dunn v. Altman*, 50 Mo. App. 231.

³ *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. Rep. 262.

⁴ *Day v. Everett*, 7 Mass. 145.

⁵ *Tilley v. Harrison*, 91 Ala. 295, 8 S. Rep. 802.

⁶ *Banks v. Conaught*, 14 Allen (Mass.), 497; *Mears v. Bickford*, 52 Me. 528; *Halliday v. Miller*, 29 W. Va. 424, 1 S. E. Rep. 821; *United States v. Bainbridge*, 1 Mason, C. C. 71, 86; *Gapen v. Gapen* (W. Va.), 23 S. E. Rep. 579; *Commonwealth v. Murray*, 4 Bin. (Pa.) 487; *Kelly v. Sproul*, 97 Mass. 169; *Taylor v. Mechanics' Savings Bank*, 97 Mass. 345; *Johnson v. Weatherhouse*, 152 Mass. 585, 26 N. E. Rep. 234; *Carson v. Watts*, 3 Doug. (K. B.) 350; *Baker v. Baker*, 41 Vt. 55; *Magee v. Magee*, 65 Ill. 255. The

such as prize capture, engagement in the military service and like duties, the infant child takes the personal risk. The dire consequences which might happen would fall upon him. It is not the character of duty which a father has the right to require of his child as a legal right, and it seems meet that the child taking these serious risks ought to have the reward for his extraordinary energies and risk of person.¹ If pay for such service be made to the parent, he will be deemed a trustee for the child to the extent of the amount thus received, and required to account to the child therefor.² But if an infant is enticed away from his parent by a stranger and placed in the military service as a substitute without the knowledge or consent of the parent, the person so enticing away the infant will be liable to the parent for the value of the services of the child from the time he is thus allured away until he attains his majority, unless he is sooner restored to his parents, in which event such third person will be liable to the parent for the time the child has been away.³ This is upon the principle that the parent has the right to the services of his child during minority, and when a stranger does any act which deprives the parent of such services, in whole or in part, as the case may be, the wrong-doer must respond in damages, because no one is permitted to deprive another of anything of value by a wrongful act and escape liability to the injured party for the tort thus committed.

§ 466. Right of child to recover for services — Question of fact.—The question whether or not the parent is liable to the child for services rendered in the family of a domestic nature is generally one of fact. This liability, therefore, will usually depend upon the facts, circumstances and surroundings of each particular case. “If, under all the circumstances of the case, the services are of such a nature as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be made for them, then the jury should

contrary is held in Indiana, however.
Bundy v. Dodson, 28 Ind. 295; *Ginn v.*
Ginn, 38 Ind. 526.

² *Halliday v. Miller*, 29 W. Va. 424,
 1 S. E. Rep. 821.

³ *Bundy v. Dodson*, 28 Ind. 295.

¹ *Gapen v. Gapen* (W. Va.), 23 S. E.
 Rep. 579.

find an implied promise and a *quantum meruit*; but if otherwise, they should find that there was no implied promise.”¹ In cases of this kind a recovery may be had under allegations of an express promise, though the proof support only an implied promise. Proof of either kind of a contract shows a liability, and this liability is no more nor less binding under an implied than an express agreement.² If the father enters into a contract of partnership with his minor child he will be liable thereon, and the son may recover from the father his share in the profits of the business under such contract.³ And a promissory note executed by the parent to the child for domestic services during minority is supported by a sufficient consideration.⁴ And this, of course, would amount to a consent on the part of the parent that the child might receive compensation personally for his services to this extent. It would amount to a manumission, so far as the right to services is concerned, to this extent.

§ 467. Services of child — Abandonment by parent — Who entitled to.— “If the father deserts and abandons his family, exercises no control over them, interferes with them in no way, manifests no interest in their welfare, does not communicate with nor look after them, the relation of master and servant is dissolved, and the principle of servitude no longer sustains the right of the father to the wages of his infant child. It is as if the father were dead, and the custody of the child, and the right to appropriate his earnings, thereupon devolve upon the mother.” If the father refuses to be a parent in act as well as in name, the law will not recognize his right to control the earnings of his infant child whom he thus casts aside to neglect. And when this is the case, the mother, if living, or if she

¹ *Guild v. Guild*, 15 Pick. (Mass.) 129, 131; *Andrus v. Foster*, 17 Vt. 556, 560; *Asmmon v. Wood* (Mich.), 65 N. W. Rep. 529; *Croxton v. Foreman*, 13 Ind. App. 442, 41 N. E. Rep. 838; *Foerster v. Foerster*, 10 Ind. App. 680, 38 N. E. Rep. 426; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. Rep. 808, 34 N. E. Rep. 611; *McGarvey v. Roods*, 73 Iowa, 363, 35 N. W. Rep. 488; *Geary v. Geary*, 67 Wis. 248, 30 N. W. Rep. 601; *Hillebrans v. Nibbelink*, 44 Mich. 413, 6 N. W. Rep. 861; *Finnell v. Gooch*, 59 Mo. App. 209; *Dash v. Inabiniet* (S. C.), 31 S. E. Rep. 297.

² *Foerster v. Foerster*, 10 Ind. App. 680, 38 N. E. Rep. 426.

³ *Washington v. Washington* (Tex. Civ. App.), 31 S. W. Rep. 88.

⁴ *Petty v. Young*, 43 N. J. Eq. 654, 12 Atl. Rep. 392.

is dead and there is no statutory guardian, the child himself, will be entitled to his earnings.¹ That the mother, upon such abandonment and neglect by the husband, procures a divorce dissolving the bonds of matrimony, will not affect her right to the care, control and earnings of her infant child who has been thus abandoned by the father—at least as to strangers and third parties.² She is still the mother in fact to as full an extent as though there had been no dissolution of the marriage. The decree of divorce only dissolves the marriage relation between the parties thereto; it does not in any sense dissolve the relation of parent and child. Nor does it add to or detract from the legal or moral duty which a parent owes to his child or children.

§ 468. Services — Agreement to convey land therefor — Statute of frauds.—An infant who goes into the family of another for the purpose of becoming a member thereof and rendering domestic services as a child by nature upon the agreement that he is to have the property, real and personal, of the *quasi*-parent at death, will be entitled to specific performance of such a contract,—this, of course, where the legal representatives and heirs of such parents have no right of inheritance paramount to the right to enforce specific performance.³ It is true such an agreement cannot be enforced when within the statute of frauds, but the presumption is, in the absence of a contrary showing, that the contract was in writing or otherwise in due form, where this is necessary to enable it to stand against the statute.⁴ It is equally true that such an agreement could not supplant any positive statutory enactment relative

¹ *Nightingale v. Withington*, 15 Mass. 274; *Clay v. Shirley*, 65 N. H. 644, 23 Atl. Rep. 521; *Kelly v. Davis*, 49 N. H. 187. This is the statutory rule in Pennsylvania. *Eustice v. Plymouth Coal Co.*, 120 Pa. St. 290, 13 Atl. Rep. 975.

² *Winslow v. State*, 92 Ala. 78, 9 S. Rep. 728.

³ *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. Rep. 107. In this case the child was held entitled to the property of the adopting parents, she hav-

ing faithfully performed the agreement on her part, in preference to brothers and sisters who might, as collateral heirs, inherit but for the rights of the stranger child who had thus performed her contract in consideration of the promise by the new parent to convey the property upon the performance of the services. See *Koch v. Hebel*, 32 Mo. App. 103.

⁴ *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. Rep. 107.

to the laws of descent, as, for instance, where the statute vests absolutely upon the death of the ancestor a certain sum of money, or some share in such estate, in his infant children or in his widow, etc. In many of the states total disinheritance is forbidden, and, when this is true, the aim and object of such laws could not be defeated at the hands of a parent by taking a strange child into his family upon the agreement that the parent would leave him all his property.

§ 469. Authority of parent over child — Extent of.— By the ancient Roman law the father who has brought his child into the world had the absolute right of life and death over it. This was upon the theory that he who gave an existence had the right to take it away. Later Roman laws softened the stern rigor of this rule, and such an idea has to-day no place in the jurisprudence of civilized countries.¹ The authority which a parent may exert in this respect in the present enlightened age is simply the right to inflict such bodily punishment or chastisement as is reasonably necessary to compel a dutiful and proper respect for and obedience to the parental authority and all reasonable requirements made in pursuance thereof; for this is necessary to the end that the parent may bring up his child in dutiful obedience and general usefulness.² And so long as the parent exercises proper moderation, there is no criminal liability for chastising his child. If, however, he exceed the bounds of moderation and correct his child in a brutal or cruel and unnecessary manner, he is amenable to the criminal laws punishing assault and battery and like offenses.³ In all cases of this kind, where the facts are such that a conclusion might be reached finding the chastisement warranted or not under all the circumstances, the question of the excessiveness of the punishment becomes one of fact for the court or jury trying the action.⁴ A grandparent, however, has no legal authority over nor right to control or correct in any way his grandchildren. This privilege is restricted to the natural parents alone, if liv-

¹ 1 Bl. Comm. 452.

² 1 Bl. Comm. 452.

³ Johnson v. State, 2 Humph. (Tenn.) 282; Hinkle v. State, 127 Ind. 490, 26 N. E. Rep. 777; Hornbeck v. State, 16 Ind. App. 484, 45 N. E. Rep. 620.

⁴ Hinkle v. State, 127 Ind. 490, 26 N. E. Rep. 777; Johnson v. State, 2 Humph. (Tenn.) 282; Hornbeck v. State, 16 Ind. App. 484, 45 N. E. Rep. 620.

ing.¹ And a striking by a grandparent in correction of a child would be an assault and battery under the criminal laws and punishable accordingly; for this would be an unlawful act in itself.

§ 470. Duty of parent to support child — Right of allowance out of estate of child.— While the duty of the parent to maintain his child remains regardless of the poverty of the parent or the wealth of the child, yet, in proper cases, where it is manifestly best for the welfare and proper education, care and maintenance of the child, courts will often decree an allowance out of the estate of a child to a parent in order to enable the latter the better to support, educate and raise him; this, of course, being done for the advancement and best interest of the child rather than any favor to the parent.² There is no legal duty on the part of the mother to support her children so long as the father lives. And an allowance may be made out of the estate of the child for his support where the father is unable to care for it, though the mother have ample means.³ The courts of chancery are usually the proper tribunals to direct and supervise an allowance out of the estate of an infant child for his support.⁴ This is done, too, though no such provision is made or suggested by those from or through whom the child receives his estate.⁵ An allowance out of the

¹Succession of Reiss, 46 La. Ann. 347, 15 S. Rep. 151.

²Harring v. Coles, 2 Bradf. 349; Haley v. Bannister, 4 Madd. 275; In re Wall's Estate, 2 Pa. Dist. Rep. 580; Cudworth v. Thompson, 3 Desaus. (S. C. Eq.) 256; Gerdes v. Weiser, 54 Iowa, 591, 7 N. W. Rep. 380; Freybe v. Tiernan, 76 Tex. 286, 18 S. W. Rep. 370; Newport v. Cook, 2 Ashm. (Pa.) 332; Callis v. Blackburn, 9 Ves. 470; Bedford v. Bedford, 32 Ill. App. 455, 26 N. E. Rep. 662; Crickett v. Dolby, 3 Ves. 10, 17; Greenwell v. Greenwell, 5 Ves. 194; Errat v. Barlow, 14 Ves. 202; Meyers v. Meyers, 2 McCord (S. C. Eq.), 214, 255; Dupont v. Johnson, 1 Bai. (S. C. Eq.) 279; Dawes v. Howard, 4 Mass. 97; Barlow v. Grant, 1 Vern. 41; In re Burke, 4 Sandf. Ch.

617; Cooper v. Martin, 4 East, 76; Wilkes v. Rogers, 6 Johns. 566; Pierce v. Pierce, 64 Wis. 73, 24 N. W. Rep. 498; Perkins v. Westcoat, 3 Colo. App. 338, 33 Pac. Rep. 139; Haywood v. Haywood's Ex'r, 4 Desaus. (S. C. Eq.) 445; Rhode v. Tuten, 34 S. C. 496, 13 S. E. Rep. 676; Watts v. Steele, 19 Ala. 656; Trimble v. Dodd, 2 Tenn. Ch. 500; Patton's Adm'r v. Patton, 3 E. Mon. (Ky.) 160; Osborne v. Van Horn, 2 Fla. 360; Roach v. Garvan, 1 Ves. Sr. 157; Pulsford v. Hunter, 3 Brown Ch. 416.

³Haley v. Bannister, 4 Madd. 275.

⁴Newport v. Cook, 2 Ashm. (Pa.) 332; In re Burke, 4 Sandf. Ch. 617; Watts v. Steele, 19 Ala. 656.

⁵Collis v. Blackburn, 9 Ves. 470.

infant's estate will never be made, however, when the father is fully able to support him, or when sought by the child for the indulgence of unnecessary luxury or extravagance.¹ And the allowance may be for past as well as for future support.² It is the policy of the law not to permit any part of the *corpus* of an estate of an infant to be appropriated to his support and maintenance so long as the income thereof will suffice; though of course, when actual necessity demands it, even the *corpus* of the estate, as far as really necessary, may be appropriated for this purpose.³ But before any allowance will be made out of the body of the estate of the child, diligent inquiry as to the ability of the parent to earn a support either from his business, his labor or his property will be made.⁴ The court will never direct such an allowance as a matter of course.⁵ And the *onus* is always on the person seeking to have the allowance made, to show that the real necessity therefor exists.⁶

§ 471. Duty to support — Child must be human.— The duty of the parent to support his child is necessarily confined to children which take the nature of a human. If, perchance, it be a monster or beastly in any way to an extent that it cannot be properly classed as of the *genus homo*, and therefore possessing a soul, there is no legal duty resting upon the unfortunate parents to support it.⁷ But if there is a mere deformity, however great or unnatural, if the offspring have human shape and human mind, it will be entitled to the rights of a child.⁸ The duty enjoined by law upon a parent to maintain his offspring has never been restricted to such of his children as are comely or perfectly formed. The unfortunate idiot, the cripple or child afflicted with any mere imperfection of mind or body, has as great claims upon the parent who has brought

¹ In re Harland, 5 Rawle (Pa.), 323; Bedford v. Bedford, 32 Ill. App. 455, 26 N. E. Rep. 662.

² Wilkes v. Rogers, 6 Johns. 566, 594; Aynsworth v. Pratchelt, 13 Ves. 320; Pierce v. Pierce, 64 Wis. 73, 24 N. W. Rep. 498; Freybe v. Tiernan, 76 Tex. 286, 13 S. W. Rep. 370.

³ In re Bostick, 4 John. Ch. 100; Osborn v. Van Horn, 2 Fla. 360; Freybe

v. Tiernan, 76 Tex. 286, 13 S. W. Rep. 370.

⁴ Fuller v. Fuller, 23 Fla. 236, 2 S. Rep. 426.

⁵ In re Kane, 2 Barb. Ch. 375.

⁶ Fuller v. Fuller, 23 Fla. 236, 2 S. Rep. 426.

⁷ 1 Co. Litt. 3b; 2 Bl. Comm. 246.

⁸ 2 Bl. Com. 246.

him into the world as have the most perfect children mentally and physically. Indeed, from a moral standpoint, the unfortunate offspring should have greater claims, for two reasons: In the first place, by reason of imperfection or deformity a child would not be as capable of taking care of himself; and on the other hand, the misfortune should call for greater care, attention and sympathy, to the end that the unhappiness incident to this condition may be reduced to the minimum.

§ 472. Duty which the child owes to its parent.— The law imposes no particular civil obligation upon the child toward the parent except that it enjoins respect and dutiful obedience during minority when the parent is entitled to the services of the child. There is, under the common law, no legal obligation resting upon a child to support or assist in supporting a parent after the child reaches his majority, though certainly there is a strong moral obligation so to do. And under the old Athenian law a liability was fixed upon the child to support its lawful parents whenever by misfortune they became unable to support themselves.¹ In New York there is a statutory liability imposed upon the child to support his parents.² Of course, when a statute imposes upon a child the duty of supporting his parents in their old age or need, this must be done. It should be cheerfully complied with by force of a moral duty and natural affection, regardless of the existence or absence of such a statute.

§ 473. Authority of parent over child — Right to delegate.— A parent may, ordinarily, delegate part of his authority over his child to an instructor or tutor. The authority which may be thus delegated extends only to such as is necessary to enable the instructor to properly school the student, and may be exercised to the extent reasonably necessary and proper to induce obedience to the reasonable and necessary rules of the teacher and proper application in the studies assigned to the child.³ If the master exceeds the bounds of a

¹ 1 Bl. Comm. 454.

² *Edwards v. Davis*, 16 Johns. 281. And there are probably similar statutes in some of the other states.

³ 1 Bl. Comm. 453; Commonwealth

v. Randall, 4 Gray (Mass.), 36; *State v. Pendergrass*, 2 Dev. & Bat. (N. C. Law), 365; *Cooper v. McJunkind*, 4 Ind. 290.

reasonable and proper punishment for misconduct on the part of the student so intrusted to his care, he will be liable to a criminal prosecution for assault and battery, and punishable accordingly.¹ And whether the school-master has exceeded proper bounds in inflicting the punishment will generally be a question of fact to be ascertained from all the surrounding circumstances of the case.² By no means will the school-master be permitted to assault a student to gratify his own malice or ill-will;³ nor, indeed, for any purpose except in good faith to administer needed correction, and require submission to proper rules and regulations as well as due application to study.

§ 474. Commitment of child to reformatory — Proceedings.—Sometimes it is provided that an infant may be taken from the custody and control of his parents and committed to an institution for reformation. Such statutes are designed to reclaim any child whose vicious propensities threaten his moral training. These, of course, are vested with authority only when the downward tendency of the child is such as to probably corrupt his permanent qualities, and not for the purpose of correcting small casual misdeeds. But, in all proceedings for this purpose, no presumptions are indulged, and every step taken must be in strict accordance with the statute, or the same will be of no force.⁴ But when a child, on account of the immorality and worthlessness of its parents, is committed under law to a reformatory or charitable institution, and the proceedings are regular, the parent will not even be permitted to visit him, where it is made to appear that if he does he will either take the child away or induce him to leave.⁵ These institutions are primarily for the benefit of the child, and are for the purpose of arresting any predisposition to vicious deeds or conduct and instilling into the child wholesome in-

¹ Commonwealth v. Randall, 4 Gray (Mass.), 36; 1 Bac. Ab., Assault and Battery, C; State v. Pendergrass, 2 Dev. & Bat. (N. C. Law), 365.

² Commonwealth v. Randall, 4 Gray (Mass.), 36.

³ State v. Pendergrass, 2 Dev. & Bat. (N. C. Law), 365; Cooper v. McJun-

kind, 4 Ind. 290. See also Hussey v. Howard, 14 Johns. 119.

⁴ People v. Carpenter, 57 Hun, 588, 11 N. Y. S. 852; People v. Baker, 3 N. Y. S. 536. And see In re Diss De Bar, 3 N. Y. S. 667; People v. New York Catholic Protectory, 106 N. Y. 604, 13 N. E. Rep. 435.

⁵ In re Diss De Bar, 3 N. Y. S. 667.

struction and principles, to the end that he may, if possible, become an honorable man and useful citizen, rather than grow up with an unbridled predisposition to evil.

§ 475. Right of parent to appoint guardian.— At the common law the father might, by will, appoint a guardian of the person of his infant children;¹ and this is always permissible when authorized by statute.² Statutes on this subject, however, usually confer the power to appoint a testamentary guardian upon the surviving parent, or, in some instances, upon either parent, with the express sanction of the other.³ The reason, no doubt, is that statutes rarely or never at this day authorize either parent to dispose of the person and custody of the child after the death of either without the consent of the other, because of the common-law right of the survivor, whether it be the father or mother, to the custody and control of the person of the infant child. And to make certain the consent of the other to the testamentary disposition of the child, it is sometimes, and perhaps generally, required to be in writing, to the end that there may be no mistake about it.⁴ The right of appointing a guardian of the person by the father grew out of the rigid common-law idea of the supremacy and authority of the father over the child—a rule under which little mercy was shown the mother. But the old idea, in this respect, is little favored at the present day; for by the rule as now generally accepted, at the death of the father the right to custody of the children vests in the mother. And in some instances she will even be preferred to the father while he is living, where the welfare and good of the child require it.

§ 476. Criminal law—Coercion of parent—Effect of.— While the parent has the control of the child, and the child is justified ordinarily in obeying its parent, yet such child is not warranted in committing an act at the request or direction of the parent which is a violation of the law.⁵ While the parent

¹ 1 Bl. Comm. 453; 2 Kent, Comm. 193.

² *Berger v. Frakes*, 67 Iowa, 460, 23 N. W. Rep. 746.

³ Sand. & H. Dig. Ark., §§ 3574, 4950.

⁴ See Sand. & H. Dig. Ark., § 4950.

⁵ 1 Hale, P. C. 44; 1 Russell, Crimes (International ed., 1896), 145, 146; 1 Hawk. P. C., ch. 1, § 14.

would in such case be guilty of a crime himself, the child, being of sufficient age to know right from wrong and being capable of committing a crime, would also be amenable to the law for the criminal act thus performed at the request of the parent. The parental direction will not protect the mature child from the penal consequences of an act; though cases might arise where the child is, by superior force, compelled by the parent to commit a crime against his will. In such cases, no doubt, the parent alone would be punishable for the unlawful act.

§ 477. **Maintenance.**—The fact that a parent may uphold and assist his child in the defense or prosecution of *bona fide* litigation, and *vice versa*, will not make such parent or child guilty of maintenance or champerty. The ties of blood and the mutual interests of the parties excuse them in law from what would be the consequences of such interference by officious third persons or strangers, both from a civil and criminal standpoint.¹ It is but natural for the parent to take and feel a lively interest in all the affairs of his child; or for the child to feel such an interest in matters affecting his parent by reason of the blood and confidential relation existing between them. But as to strangers or officious third persons the reason of the rule does not exist and it is denied as to them.

§ 478. **Right of parent to defend his child.**—The law gives to the parent the right to defend his child from assault or violence at the hands of any one under practically all circumstances. This force offered to the child may be repelled by the parent with such opposing force as is reasonably necessary, regardless of the consequences.² The rule applies oppositely as well. So the child may likewise lawfully slay an assailant of his parent when necessary to prevent death or great bodily harm to the parent, or may defend him in any other necessary way.³ But in order that the parent or child defending, as the

¹Thallhimer v. Brinckerhoff, 3 Cowen, 623; 2 Bishop's New Crim. Law, § 128.

²1 Bl. Comm. 450; Hale, P. C. 484; Whart. Ev. (1896), § 494. See also Regina v. Harrington, 10 Cox, C. C. 370.

³Patten v. People, 18 Mich. 314; State v. Brittain, 89 N. C. 481; State v. Johnson, 75 N. C. 174; Sullivan v. Commonwealth (Ky.), 18 S. W. Rep. 530; State v. Harrod, 102 Mo. 590, 15 S. W. Rep. 373.

case may be, have the protection of the law in this respect, it must appear that the killing would have been justifiable on the ground of self-defense had the person assaulted slain his assailant;¹ though it is not necessary that the person assaulted be in actual danger. It is sufficient if the danger be apparent.² As a rule the law is liberal in granting immunity from punishment to those who do an act of violence in necessary or apparently necessary defense of a member of the same family. Especially is this true when the act is done in defense of an assault made at the family home, as this place is deemed especially sacred in law.

§ 479. Duty of child to serve parent.— There is a common-law duty imposed upon every infant child to serve its parents, in a domestic way, during minority. This is required in return for the legal duty which the law enjoins upon the parent to support his infant children. The child, upon being born, becomes the servant of his parent, and this right of service at the hands of the child continues without interruption until he has attained the age prescribed by law at which an infant ceases to be such.³ Were this not the rule, the child might work for himself, appropriate to his own use and enjoy his own earnings, and at the same time require support at the hands of his parents. The wisdom of the law, therefore, has made the duty to support and to serve during minority reciprocal, and it is supposed to be mutually beneficial. Such duty of the child to serve the parent is incident to the right of the father to control his infant and assert and keep the custody of his person.

§ 480. Right of child to recover from natural or quasi-parents for domestic services.— Where an infant child lives with his own parents, or with others, whether relatives or strangers, who stand *in loco parentis* to him, rendering them the

¹State v. Brittain, 89 N. C. 482; Deering, 4 N. H. 86, 95; Huntoon v. State v. Johnson, 75 N. C. 174; State v. Harrod, 102 Mo. 590, 15 S. W. Rep. 373. Hazleton, 20 N. H. 388, 390; McCoy v. Hoffman, 8 Cowen, 84, 85; Shute v. Dorr, 5 Wend. 204; In re Ryder, 11

²State v. Harrod, 102 Mo. 590, 15 S. W. Rep. 373. Paige, 185; Musgrove v. Kornegay, 7 Jones (N. C. Law), 71, 74; Winchester v. Reid, 8 Jones (N. C. Law), 377, 379.

³Swartz v. Hazlett, 8 Cal. 118; Jenness v. Emerson, 15 N. H. 486; Day v. Everett, 7 Mass. 145; Hillsboro v.

usual domestic services, and in return receiving support and maintenance from such parents or strangers, as the case may be, there is no presumption of law of an agreement on the part of the parent to pay the child for such services on the one hand, nor that pay will be expected, on the other. These reciprocal duties in fact preclude the idea of an intention to give or receive pay.¹

¹ *Dyer v. Kerr*, 15 Barb. 444; *Williamson v. Hutchinson*, 5 Barb. 122; *Castle v. Edwards*, 63 Mo. App. 564; *Marietta v. Marietta*, 90 Iowa, 201, 57 N. W. Rep. 708; *Robinson v. Cushman*, 2 Denio, 149; *Fitch v. Peckham*, 16 Vt. 150; *Avitt v. Smith*, 120 N. C. 392, 27 S. E. Rep. 91; *Dixon v. Hosick* (Ky.), 41 S. W. Rep. 282; *Havens v. Havens*, 50 Hun, 605, 3 N. Y. S. 219; *Spitzmiller v. Fischer*, 77 Iowa, 289, 42 N. W. Rep. 197; *Koch v. Hebel*, 32 Mo. App. 103; *Enger v. Lofland* (Iowa), 69 N. W. Rep. 526; *Andrus v. Foster*, 17 Vt. 550; *Swires v. Parsons*, 5 Watts & S. (Pa.) 357; *Candor's Appeal*, 5 Watts & S. (Pa.) 513; *Wilkes v. Cornelius*, 21 Oreg. 348, 28 Pac. Rep. 135; *Zent v. Fuch*, 60 Hun, 582, 14 N. Y. S. 806; *Smith v. Denman*, 48 Ind. 65; *Stock v. Stolz*, 137 Ill. 349, 27 N. E. Rep. 604; *Penter v. Roberts*, 51 Mo. App. 222; *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. Rep. 349; *Reynolds' Adm'r v. Reynolds* (Ky.), 18 S. W. Rep. 517; *Ulrich v. Ulrich*, 63 Hun, 633, 17 N. Y. S. 721; *Weir v. Weir*, 3 B. Mon. (Ky.) 645; *Willis v. Dunn*, *Wright* (Ohio), 134; *Ramsey v. Hicks*, 53 Mo. App. 190; *Earhart v. Deitrich*, 118 Mo. 418, 24 S. W. Rep. 188; *Marion v. Farnan*, 68 Hun, 383, 22 N. Y. S. 946; *Bennett v. Stephens*, 8 Oreg. 444; *Harris v. Smith*, 79 Mich. 54, 14 N. W. Rep. 169; *Lockwood v. Robins*, 125 Ind. 398, 25 N. E. Rep. 455; *Wright v. McLarinan*, 92 Ind. 103; *In re Evert's Estate*, 86 Hun, 325, 33 N. Y. S. 493; *Falloon v. McIntyre*, 118 Ill. 292, 8 N. E. Rep. 315; *Allen v. Allen*, 60 Mich. 635, 27 N. W. Rep. 702; *Springfield v. Bethel* (Ky.), 4 S. W. Rep. 592;

Marquess v. La Baw, 82 Ind. 550; *Mountain v. Fisher*, 22 Wis. 93; *Moyer's Appeal*, 112 Pa. St. 290, 3 Atl. Rep. 811; *Wilson v. Wilson*, 52 Iowa, 44, 2 N. W. Rep. 615; *Lynn v. Lynn*, 29 Pa. St. 369; *Cowan v. Musgrave*, 73 Iowa, 384, 35 N. W. Rep. 496; *Sawyer v. Hebard's Estate*, 58 Vt. 375, 3 Atl. Rep. 529; *Brown v. Yaryan*, 74 Ind. 305; *Horton's Appeal*, 94 Pa. St. 62; *Hertzog v. Hertzog*, 29 Pa. St. 465; *Smith v. Johnson*, 45 Iowa, 308; *Peck v. McKean*, 45 Iowa, 18; *Patton v. Commonwealth*, 114 Pa. St. 183, 6 Atl. Rep. 468; *Williams v. Hutchinson*, 5 Barb. 122; *Windland v. Deeds*, 44 Iowa, 98; *Smith v. Johnson*, 45 Iowa, 308; *Ryan v. Lynch*, 9 Mo. App. 18; *Livingston v. Ackston*, 5 Cowen, 531; *Hartman's Appeal*, 3 Grant Cas. (Pa.) 271; *Griffin v. Potter*, 14 Wend. 209; *Keegan v. Malone*, 62 Iowa, 208, 17 N. W. Rep. 461; *Ulrich v. Arnold*, 120 Pa. St. 170, 13 Atl. Rep. 831; *Cooper v. Martin*, 4 East, 76; *Ormsby v. Rhodes*, 59 Vt. 505, 10 Atl. Rep. 722; *Mobley v. Webb*, 83 Ala. 489, 3 S. Rep. 812; *Dodson v. McAdams*, 96 N. C. 49, 2 S. E. Rep. 453; *Hudson v. Lutz*, 5 Jones (N. C. Law), 217; *Gerber v. Bauerline*, 17 Oreg. 115, 19 Pac. Rep. 849; *Defrance v. Austin*, 9 Pa. St. 309; *Barnhite's Appeal*, 126 Pa. St. 404, 17 Atl. Rep. 616; *Williams v. Williams*, 132 Mass. 304; *Williams v. Barnes*, 3 Dev. (N. C.) 348, overruling, on this point. *Hauser v. Sain*, 74 N. C. 552; *Tyler v. Burrington*, 39 Wis. 376; *Pellage v. Pellage*, 32 Wis. 136; *Scully v. Scully*, 28 Iowa, 548; *Leidig v. Coover*, 47 Pa. St. 534.

The rule is the same where the child, after arriving at full age, nevertheless continues in the home and family of his parents, rendering domestic services and receiving support in return.¹ And this is true even though the child be married. So where a daughter, whose husband was living, still lived with her parents and rendered services as before, it was held that a stranger could not defend an action by the parents for the seduction of their daughter by showing the marriage.² If the child be living with its natural parents or a very near relative, the presumption that the service is to be rendered without any pay other than support and care is very strong, and it requires clear and satisfactory proof to remove this salient inference.³ The rule also applies both ways. If a parent lives with the family of his adult child doing ordinary domestic service, and in return receiving food, clothing, shelter and general necessities, neither making an express charge against the other, the presumption is, the services are understood by both to be gratuitous, and that the support is furnished without expectation of pay from the parent.⁴ It is not competent, in order to deter-

¹ Wells v. Perkins, 43 Wis. 160; Burgess v. Burgess, 109 Pa. St. 312, 3 Atl. Rep. 167; Grant v. Grant, 109 N. C. 710, 14 S. E. Rep. 90; Harris v. Smith, 79 Mich. 54, 44 N. W. Rep. 54; Harper v. Luffkin, 7 Barn. & Cr. 887; Willis v. Dunn, Wright (Ohio), 134; Andrus v. Foster, 17 Vt. 556; Tyler v. Burrington, 89 Wis. 376; Havens v. Havens, 50 Hun, 605, 3 N. Y. S. 219; Hertzog v. Hertzog, 29 Pa. St. 465; Hack v. Stewart, 8 Pa. St. 213; Brock v. Cox, 38 Mo. App. 40; Fiertag v. Fiertag, 73 Mich. 297, 41 N. W. Rep. 414; Byrnes v. Clark, 57 Wis. 13, 14 N. W. Rep. 815; Pellage v. Pellage, 32 Wis. 136; Leidig v. Conover's Ex'rs, 47 Pa. St. 534; Putnam v. Town, 34 Vt. 429; Hilbish v. Hilbish, 71 Ind. 27; Schwachtgen v. Schwachtgen, 65 Ill. App. 127.

² Harper v. Luffkin, 7 Barn. & Cr. 587. In this case Lord Tenterden said: "In many instances married women are in fact hired as servants. Such contracts are no doubt liable to

be defeated at the will of the husband. He may put an end to that relation of master and servant; but, unless he interferes, it by no means follows that such a relation may not exist, especially as against third persons who are wrong-doers."

³ Ayers v. Hull, 5 Kan. 419; Greenwell v. Greenwell, 28 Kan. 675; Williams v. Hutchinson, 3 N. Y. 319; Hall v. Finch, 29 Wis. 278; Shane v. Smith, 37 Kan. 55, 14 Pac. Rep. 477; Burgess v. Burgess, 109 Pa. St. 312, 2 Atl. Rep. 167; Louder v. Hart, 52 Mo. App. 377; Wilkes v. Cornelius, 21 Oreg. 348, 28 Pac. Rep. 134; Hack v. Stewart, 8 Pa. St. 213.

⁴ Bostwick's Appeal, 71 Wis. 273, 37 N. W. Rep. 405; McGarven v. Roods, 73 Iowa. 363, 35 N. W. Rep. 488; Harris v. Currier, 44 Vt. 468; Leary v. Leary, 68 Wis. 662, 32 N. W. Rep. 623; Young v. Herman, 97 N. C. 280, 1 S. E. Rep. 792; Howe v. North, 69 Mich. 272, 37 N. W. Rep. 213; Bradley v. Kent's Ex'rs, 7 Houst. (Del.) 372, 32

mine whether there is any liability for services from a parent or child, whether the child be a natural one, or being in the family of his *quasi*-parents, rendering them services in the capacity of a child, to prove that it is the custom where the parties live for infants to be paid for services of a domestic nature. The law governs the right of recovery, and it will not permit a custom of a class of people to take the place of the required contract, which must in all cases exist, whether it be express or implied, unless, of course, the infant has been manumitted by the person from whom the recovery for the services is sought, and who by law has a right to the same.¹ The fact that the relation of the parties is that of grandparent and grandchild will not serve to rebut the presumption that there was no intention to pay for the services of the child to his grandparents.² And courts never encourage claims for such services when not made until after the death of the person sought to be charged, and very properly should not.³ The very fact that the one claiming to be entitled to wages for services of this nature waits until the other party is dead is sufficient of itself, ordinarily, to throw suspicion upon the validity of the claim. For he has waited until his adversary has been disarmed by death, and claims of this kind after death have the appearance of an effort to take advantage of the fact of death itself.

§ 481. Recovery by child for domestic services — Exception to the general rule.—The rule that the infant child is presumed to work for his parent without receiving compensation therefor, other than domestic support and maintenance, is not an inflexible one, but, like all general rules, has its exceptions which are as deep rooted as the rule itself. So, where the facts and circumstances are such as to preclude the idea that the child is serving the parent for support in return, a recovery may be had for such services. If rendered upon an express contract, this being fair will govern the amount of recovery. If no contract is expressly agreed upon, the law will

Atl. Rep. 286; *Donahue v. Donahue's Estate*, 53 Minn. 460, 55 N. W. Rep. 602; *Greenwell v. Greenwell*, 28 Kan. 675; *Cobb v. Bishop*, 27 Vt. 624; *Doane v. Doane*, 46 Vt. 485. See also *In re Porter's Estate*, 15 Pa. Co. Ct. Rep. 607; *Baxter v. Gale* (Minn.), 76 N. W. Rep. 954.

¹ *Windland v. Deeds*, 44 Iowa, 98.

² *Hauser v. Sain*, 74 N. C. 552.

³ *Ayers v. Hull*, 5 Kan. 419; *Pollock v. Ray*, 85 Pa. St. 428.

presume that a reasonable and proper compensation is to be made. Therefore, when a child, though an infant, renders services to his parents with the understanding that he is to have pay for same, whether the agreement be express or implied, the parent, while living, and his estate after his death, will be liable for such services.¹ If the father emancipates his infant and thereafter the infant works for him, such infant has a right to rely upon the presumption that he will receive pay for such services. His emancipation is inconsistent with the condition of infant servitude, and the presumption is he is to have pay for his work, for his father has expressly given him his earnings by the act of manumission.²

Where a child, after leaving the family of his parents, acquires a home and family of his own, afterwards returning to the parental roof upon the father becoming sick and unable to keep up his domestic work and business, and where these are attended to by the son through a series of months, until the death of the father, which services necessitate the giving up of the business of the son, the law will presume that there was an intention between the parties to pay and receive pay for such services.³ And where the child does extraordinary work for

¹ Quackenbush v. Quackenbush, 5 Barb. 469; Bell v. Rice (Neb.), 70 N. W. Rep. 25; Ridler v. Ridler (Iowa), 72 N. W. Rep. 671; Sword v. Kieth, 81 Mich. 246; Sammon v. Wood (Mich.), 65 N. W. Rep. 529; Taggart v. Tevanny, 1 Ind. App. 339, 27 N. W. Rep. 511; Switzer v. Kee, 146 Ill. 577, 85 N. E. Rep. 160; McCormick v. McCormick, 1 Ind. App. 594, 28 N. E. Rep. 122; O'Kelly v. Faulkner, 92 Ga. 521, 17 S. E. Rep. 847; In re Westra's Estate, 101 Mich. 526, 60 N. W. Rep. 555; Fross' Appeal, 105 Pa. St. 258; Harris v. Smith, 78 Mich. 54, 44 N. W. Rep. 169; Tyler v. Barrington, 39 Wis. 376; Pellage v. Pellage, 32 Wis. 136; Marietta v. Marietta, 90 Iowa, 201, 57 N. W. Rep. 208; Pollock v. Ray, 85 Pa. St. 428; Cowan v. Musgrave, 73 Iowa, 384, 35 N. W. Rep. 496; Cobb v. Bishop, 27 Vt. 624; Andrus v. Foster, 17 Vt. 556; Fitch v. Peckham, 16 Vt. 150; Way v. Way, 27 Vt. 625; Davis v.

Goodenow, 27 Vt. 715; Byrnes v. Clark, 57 Wis. 13, 14 N. W. Rep. 815; Manseau v. Mueller, 45 Wis. 430; Wells v. Perkins, 43 Wis. 460; Geary v. Geary, 67 Wis. 248, 30 N. W. Rep. 601; Wall's Appeal, 111 Pa. St. 460, 5 Atl. Rep. 220; Sawyer v. Hebard's Estate, 58 Vt. 375, 3 Atl. Rep. 529; Putnam v. Town, 34 Vt. 429; Sprague v. Waldo, 38 Vt. 189; Lunay v. Vantyne, 40 Vt. 501; Harris v. Currier, 44 Vt. 468; Doane v. Doane, 46 Vt. 485; Briggs v. Briggs, 46 Vt. 571; Guild v. Guild, 15 Pick. (Mass.) 129.

² Phelps, Dodge & Palmer Co. v. Hopkinson, 61 Ill. App. 400. See, too, Davis v. Gallagher, 55 Hun, 593, 9 N. Y. S. 11.

³ Marietta v. Marietta, 90 Iowa, 201, 57 N. W. Rep. 708; In re Strickland's Estate, 10 Misc. Rep. 486, 32 N. Y. S. 171; Hardy v. Hardy, 79 Md. 9, 28 Atl. Rep. 887; Wisley v. Franklin, 57 Hun, 382, 10 N. Y. S. 888.

the parent, making an outlay of a considerable sum in connection therewith, by which the property of the parent is materially improved and enhanced in value, such work and expense are not necessarily within the scope of ordinary domestic duty of a child to his parent, and a recovery therefor may be had.¹ And where a child, after attaining his majority, remains for years with his parent, assisting him regularly in his business, he will be entitled to receive pay for such services where the parent is willing to compensate him, and a payment of a reasonable amount by the parent for the services under such circumstances is based upon a valid consideration, and cannot be questioned by creditors of the parent.² In fact, if the infant, and especially a grown child, renders the parent any extraordinary services not within the scope of usual domestic work, and particularly if the services are rendered at the express request of the parent, the law readily presumes an intention to pay, on the one hand, and receive compensation on the other. And where this intention arises from the facts and circumstances, or is necessarily implied therefrom, a recovery for the services may be had.³ Nor is it necessary that the proof of the intention to pay be "full, unequivocal and conclusive;" it is sufficient if the liability to pay be established by a fair preponderance of the evidence. That is, if, upon the whole case, it is more probable, taking all the facts and circumstances into consideration, that there was an intention or expectation of paying and receiving pay than the contrary, the right to recover will be made out.⁴ A son who is married, and whose wife renders domestic services to his parents towards supporting them, will be entitled to recover therefor from his parents, where by law he is entitled to the services of his wife; for the wife of the son is under no legal obligation to so labor, nor is he under any to have her do so.⁵ In short, the law infers a promise to pay for services rendered by an adult child to the parent by special request, where the child has been living alone

¹ Ramsey v. Hicks, 53 Mo. App. 190; Hillerbrands v. Nibblink, 44 Mich. 413, 6 N. W. Rep. 861; Hutcheson v. Tucker (Miss.), 15 S. Rep. 132.

² Graves v. Davenport, 50 Fed. Rep. 891; McCormick v. McCormick, 1 Ind. App. 594, 28 N. E. Rep. 122.

³ Earhart v. Deitrich, 118 Mo. 418, 24 S. W. Rep. 188; Robnett v. Robnett, 43 Ill. App. 191; McLaughlin v. McLaughlin, 145 Pa. St. 582, 23 Atl. Rep.

400; Koch v. Hebel, 32 Mo. App. 103.

⁴ Putnam v. Putnam, 34 Vt. 429.

⁵ Switzer v. Kee, 146 Ill. 577.

and working for himself away from the parental roof, much more readily than where the child has always remained in the family of his parents. The presumption of an intention to pay and be paid is naturally much stronger in one case than the other.¹ Where an infant has been emancipated by operation of law upon attaining his majority, and begins life for himself, the reason for supposing that services rendered his parent by him after arriving at such age no longer exists; for he then receives no support from his parent, and is struggling with the world for his own, not his parent's, advancement, all of which is entirely honorable and proper.

§ 482. Right of child to recover for services — Presumptions — Burden of proof.— The presumption of law which precludes the idea of an intention on the part of the parent to pay the child for services rendered during infancy, where the child is living with his parents, is conclusive until overturned by affirmative testimony. The *onus* is therefore always on the infant asserting a right to pay to support his contention by proof sufficient to establish it by a preponderance of evidence; failing in which, he must fail in his attempt to recover.² And generally, the casual remarks or mere loose declarations that one who, as a child, has rendered domestic services, and been supported and cared for in return by the parent, should be paid, or deserves pay for same, whether to be made before death or to

¹Marion v. Farnan, 68 Hun, 383, 22 N. Y. S. 946; McCormick v. McCormick, 1 Ind. App. 594, 28 N. E. Rep. 122; Koch v. Hebel, 32 Mo. App. 103.

²Fitch v. Peckham, 16 Vt. 150; Andrus v. Foster, 17 Vt. 550; Guild v. Guild, 15 Pick. (Mass.) 129; Davis v. Gallagher, 55 Hun, 593, 9 N. Y. S. 111; Enger v. Lofland (Iowa), 69 N. W. Rep. 526; Guenther v. Birkicht, 22 Mo. 439; Morris v. Barnes, 35 Mo. 412; Bank v. Aull, 80 Mo. 199; Hart v. Hart, 41 Mo. 441; Bixler v. Sellman, 77 Md. 494, 27 Atl. Rep. 137; Candor's Appeal, 5 Watts & S. (Pa.) 513; Ronseik v. Boverschmidt's Estate, 16 Mo. App. 421; O'Kelly v. Faulkner, 92 Ga. 521, 17 S. E. Rep. 847; Grant v. Grant, 109 N. C. 710, 14 S. E. Rep. 90; In re Kirkpatrick's Estate, 34 S. C. 255, 13 S. E. Rep. 450; Leidig v. Conover's Ex'rs, 47 Pa. St. 534; McGarvey v. Roods, 73 Iowa, 363, 35 N. W. Rep. 488; Byrnes v. Clark, 57 Wis. 13, 14 N. W. Rep. 815; Wall's Appeal, 111 Pa. St. 460, 5 Atl. Rep. 220; Finnell v. Gooch, 59 Mo. App. 209; Hudson v. Hudson, 90 Ga. 581, 16 S. E. Rep. 349; Ulrich v. Ulrich, 136 N. Y. 120, 32 N. E. Rep. 606; Havens v. Havens, 50 Hun, 605, 3 N. Y. S. 219; Pritchard v. Pritchard, 69 Wis. 373, 34 N. W. Rep. 506; Ryan v. Lynch, 19 Mo. App. 18; Tyler v. Burrington, 39 Wis. 376; Hall v. Finch, 29 Wis. 278.

be paid out of the estate after death, especially if made to third persons or strangers, is not deemed sufficient to overthrow the presumption that there was no intention, on the one hand, to pay, nor expectation of remuneration, on the other.¹ This rule is necessary partly for the peace of families, and to discourage doubtful claims against the estates of dead persons for services of a domestic nature, where the right of recovery is not based upon an express contract or is not otherwise fairly to be inferred or presumed. But where there are any facts which, coupled with the declaration of the parents that the child should receive pay for domestic services, and taken in connection with the declarations, would legitimately lead to the inference or conclusion that the parent expected to pay the child for services, and that the child rendered the same with the expectation of receiving pay therefor, the issue should be submitted as a question of fact to a jury to determine whether there was or was not an agreement, express or implied, to pay.² It is not necessary that the agreement to pay be such as to establish the fact beyond a reasonable doubt. It is sufficient if, from all the facts and circumstances, the preponderance of the testimony is in favor of the agreement to pay.³ This is the usual rule in civil cases, and there is, upon principle, nothing to vary the rule as to the amount of testimony required in cases of this nature, for they partake of neither a penal nor criminal nature, and the law does not discriminate with reference to the

¹ *Leidig v. Coover*, 47 Pa. St. 534; *Hack v. Stewart*, 8 Pa. St. 213; *Hertzog v. Hertzog*, 29 Pa. St. 465; *Mos-teller's Appeal*, 30 Pa. St. 473; *Hall v. Finch*, 29 Wis. 278; *Dodson v. Mc-Adams*, 96 N. C. 149, 2 S. E. Rep. 453; *Ulrich v. Arnold*, 120 Pa. St. 170, 13 Atl. Rep. 831; *Bixler v. Sellman*, 77 Md. 494, 27 Atl. Rep. 187; *Lynn v. Lynn*, 29 Pa. St. 369; *Wayman v. Wayman* (Ky.), 22 S. W. Rep. 557; *Zimmerman v. Zimmerman*, 129 Pa. St. 922, 18 Atl. Rep. 129; *Hartman's Appeal*, 3 Grant Cas. (Pa.) 276; *Barn-hite's Appeal*, 126 Pa. St. 404, 17 Atl. Rep. 616; *Wall's Appeal*, 111 Pa. St. 460, 5 Atl. Rep. 220; *Graham v. Gra-ham*, 84 Pa. St. 475; *In re Brundage's Estate*, 10 Misc. Rep. 668, 32 N. Y. Supp. 820; *Murphy v. Corrigan*, 161 Pa. St. 59; *Reynolds' Adm'r v. Rey-nolds* (Ky.), 18 S. W. Rep. 517; *In re Kirkpatrick's Estate*, 34 S. C. 255, 13 S. E. Rep. 450; *Woods v. Land*, 30 Mo. App. 176. See, too, *Perkins v. West-coat*, 3 Colo. App. 338, 33 Pac. Rep. 139.

² *Walters v. Mayhew*, 55 Hun, 612, 8 N. Y. S. 771; *Marion v. Farnan*, 68 Hun, 383, 22 N. Y. S. 946; *Justice v. Lang*, 52 N. Y. 323; *Ulrich v. Ulrich*, 136 N. Y. 120, 32 N. E. Rep. 606; *Donahue v. Donahue's Estate*, 53 Minn. 460, 55 N. W. Rep. 602.

³ *Donahue v. Donahue's Estate*, 53 Minn. 460, 55 N. W. Rep. 602.

evidence required in a civil action. What will support a verdict or conclusion in one action of a civil nature will, with equal effect, do so in another.

§ 483. Services of child — Presumption of gratuity — Rebuttal.— While the presumption that a child, or other person standing in the relation of child, rendering general domestic services for his parent or *quasi*-parent, is a strong one, yet it can, of course, be overcome by proof that the intention of the parties was otherwise. So it is always held that positive proof of express agreement to pay the child for services of a domestic nature will effectively rebut this presumption and furnish a basis of recovery according to the terms of the agreement.¹ Further, a promise on the part of the parent to compensate the child for his services, though of the ordinary domestic kind, may be established by facts which are inconsistent with the absence of a promise, or which serve to raise a necessary presumption or inference that there was a mutual understanding that payment should be made.² A son who agrees with his parent to furnish support for the parent after the child has arrived at majority, no price being agreed upon, will be liable when the necessaries are furnished, though the parent support himself in part, and though no time within which payment shall be made is specified, nor any length of time agreed upon for the support to continue. Such facts are sufficient to base a recovery upon a *quantum meruit* for the services rendered and received.³ A contract between a parent and child for services may be by parol, but, if by parol, it must provide for perform-

¹ Taggart v. Tevanny, 1 Ind. App. 839, 27 N. E. Rep. 511; Stewart v. Small, 11 Ind. App. 100, 38 N. E. Rep. 826; Dobbs v. Humphries, 1 Mo. App. Rep. 124; Hudson v. Hudson, 90 Ga. 581; McCormick v. McCormick, 1 Ind. App. 594, 28 N. E. Rep. 122; Bennett v. Bennett, 8 Oreg. 444.

² Smith v. Denman, 48 Ind. 65; House v. House, 6 Ind. 60; Botts v. Fultz, 70 Ind. 396; Hill v. Hill, 121 Ind. 255, 23 N. E. Rep. 87; Hilbish v. Hilbish, 71 Ind. 27; McCormick v. McCormick, 1 Ind. App. 594, 28 N. E.

Rep. 122; Wallace v. Long, 105 Ind. 522, 5 N. E. Rep. 666; Story v. Story, 1 Ind. App. 284, 27 N. E. Rep. 573; Webster v. Wardsworth, 44 Ind. 283; King v. Kelly, 28 Ind. 89; Brock v. Cox, 38 Mo. App. 40; Davis v. Gallagher, 55 Hun, 593, 9 N. Y. S. 11; Pritchard v. Pritchard, 69 Wis. 373, 34 N. W. Rep. 506; Lynn v. Lynn, 29 Pa. St. 369; Ridler v. Ridler (Iowa), 62 N. W. Rep. 671; Saunders v. Saunders (Me.), 38 Atl. Rep. 172.

³ Botts v. Fultz, 70 Ind. 396.

ance within the period required by the statute of frauds, and in no event can such a contract extend to a period beyond the life of the parent. The child can in no event recover for services from the estate of his parent which were rendered after his death.¹

§ 484. Services of child — Agreement to pay for in real estate — Statute of frauds.— An agreement by a parent to pay his child for services by giving land in return therefor is usually held void because within the statute of frauds, unless in writing or partly performed to the extent that the case is taken out of the statute thereby. Indeed, no other result can be reached, as the provisions of the statute, as usually in force, vitiate all contracts for the conveyance of realty not entered into in conformity with its requirements.² If possession is given in pursuance of the agreement, specific performance thereof may be enforced upon the parent or his legal representatives refusing to comply therewith.³ The performance of the parol agreement on the part of the child, however, would not of itself take the case out of the statute as to the agreement to convey the realty. In order to evade the effects of the statute as to the land, there must, in addition to the mere performance of the contract to serve, be some part performance of the contract to convey the realty as would entitle the purchaser to specific performance upon a compliance with his part of the contract.⁴ But though an agreement of this kind be void for want of part performance, it is nevertheless sufficient upon which to base a right of recovery for the actual value of the services thus rendered, for the positive agreement to convey or bequeath the land, as the case may be, is ample to rebut any idea of gratuity of services, and upon a failure on the part of the parent to pay in land as agreed, where he cannot be compelled to pay by reason of the statute of frauds, the child will have his right of action for the value of his services. The parent cannot have these and refuse to either perform his contract ac-

¹ In re Merchant's Estate, 53 Hun, 638, 6 N. Y. S. 875.

² Ellis v. Carey, 74 Wis. 176, 42 N. W. Rep. 252.

³ Ellis v. Carey, 74 Wis. 176, 42 N. W. Rep. 252.

⁴ Alderson v. Madison, L. R. 8 App. Cas. 467; Brandies v. Neustadt, 13 Wis. 142; Smith v. Finch, 8 Wis. 245; Ellis v. Carey, 74 Wis. 176, 42 N. W. Rep. 252; Blanchard v. McDougal, 6 Wis. 167.

according to its terms, or pay a reasonable value.¹ If the contract for the services is to be performed by the conveyance of both real and personal property, and it be indivisible so that its parts cannot be separated, the whole contract must fail because within the statute of frauds as to realty, as there can be no such thing as a valid and void part of a single, entire contract.² If the contract for such services, however, was to be paid at different times, and was payable as to the personalty at one time, and as to the realty at another and later date, no doubt there could be a recovery for the value of the personalty upon default, as the contract would then be divisible, just as agreements, for instance, to pay rents monthly. Each instalment would be due and collectible as it respectively fell due, regardless of what may be unpaid or unperformed.

§ 485. Right of parent to emancipate — General rule.—

The child is the servant of the parent until he arrives at the age of majority. Until then the parent, if he wishes to assert it, has the right to enjoy all the earnings of his infant child. These he may appropriate to the payment of his debts, to the acquirement of property, may invest same, or make any disposition of them which he might make of any of his other property. On the other hand, if the parent sees fit, for any reason, to let his child make his own contracts, and receive, enjoy and control his own wages, this he may do without doubt so far as the legal right to do so is concerned.³ In the manumission of his child the parent loses, and the child receives, a valuable privilege. The benefits thus inuring to the child are therefore a valuable consideration and sufficient to support a contract on the part of the child — as, for instance, an agreement to support his parents in their old age.⁴ But as manumission effects the release of a part of the authority and control of the parent

¹ *Campbell v. Campbell*, 65 Barb. 639; *Quackenbush v. Ehle*, 5 Barb. 469; *Robinson v. Raynor*, 28 N. Y. 494; *Clark v. Davidson*, 53 Wis. 317, 10 N. W. Rep. 384; *Ellis v. Carey*, 74 Wis. 176, 42 N. W. Rep. 252.

² *Clark v. Davidson*, 53 Wis. 317, 10 N. W. Rep. 384; *Ellis v. Carey*, 74 Wis. 176, 42 N. W. Rep. 252.

³ *Wambold v. Vick*, 50 Wis. 456, 7 N. W. Rep. 438; *Wheeler v. St. Joseph & W. R. Co.*, 31 Kan. 640, 3 Pac. Rep. 297; *Atkins v. Sherbino*, 58 Vt. 248, 4 Atl. Rep. 703; *Allen v. Allen*, 60 Mich. 635, 27 N. W. Rep. 702.

⁴ *Baldwin v. Worcester*, 66 Vt. 54, 28 Atl. Rep. 633.

over his child, it is rarely or never presumed, but must be established by affirmative testimony; and without some testimony to support it, does not, as a general rule, exist.¹ But while this is true, it may nevertheless be shown by facts and circumstances from which arise the necessary implication or inference that the parent has parted with his authority over his child to this extent.² This being true, if the parent permits the child to make a contract with another to render services, the parent being at the time apprised of all the facts, this will be deemed a release of the right in the parent to the wages of the infant, and the employer may pay the same to the child instead of to the parent.³

When the parent proceeds by affirmative action to have the earnings of the infant adjudged to belong to the latter, he will have to prove that he is or was lawfully married to the mother of the child, and that the infant is the offspring of such union, where the relationship of parent and child is denied by the defendant. For, in such a case, the parent assumes the *onus* of showing every fact necessary to make out his contention.⁴ If one who has employed an infant, with the sanction of the parent, should refuse to pay for the services, the action must be enforced by the infant under such procedure as the local laws may require for suits by infants. The father cannot recover same in his own right, for the action is upon contract,

¹ Sumner v. Sebec, 3 Greenl. (Me.) 223; Clay v. Shirley, 65 N. H. 644, 23 Atl. Rep. 521; Hall v. Hall, 44 N. H. 293; Titman's Adm'r v. Titman, 64 Pa. St. 480.

² Abbott v. Converse, 4 Allen (Mass.), 530, 533; Dennyville v. Trescott, 30 Me. 473; Wells v. Kennebunk, 8 Greenl. (Me.) 200; Clay v. Shirley, 65 N. H. 644, 23 Atl. Rep. 521; Halliday v. Halliday, 29 W. Va. 424, 1 S. E. Rep. 821; Washington v. Washington (Tex. Civ. App.), 31 S. W. Rep. 88; Smith v. Smith, 30 Conn. 11; Canovar v. Cooper, 3 Barb. 115; Armstrong v. McDonald, 10 Barb. 300; Shuster v. Bauman Jewelry Co., 79 Tex. 188, 15 S. W. Rep. 259; Haugh, etc. Iron Works v. Duncan, 2 Ind. App. 264, 28 N. E. Rep. 334; Dierker

v. Hess, 54 Mo. 246; Clemens v. Brillhart, 17 Neb. 335, 22 N. W. Rep. 779.

³ Taylor v. Welsh, 92 Hun, 272; Pardy v. American Ship Windlass Co. (R. I.), 34 Atl. Rep. 737; Whiting v. Earle, 3 Pick. (Mass.) 201; Burlingame v. Burlingame, 7 Cowen, 92; Morse v. Welton, 6 Conn. 547; Eubanks v. Peak, 2 Bai. (S. C. Law), 497; Smith v. Smith, 30 Conn. 111; Gale v. Parrott, 1 N. H. 28; Canovar v. Cooper, 3 Barb. 115; Varney v. Young, 11 Vt. 258; Atkins v. Sherbino, 58 Vt. 248, 4 Atl. Rep. 703; Bell v. Bumpus, 63 Mich. 375, 29 N. W. Rep. 862; Woodell v. Coggshall, 2 Met. (Mass.) 92; Aulger v. Badgely, 29 Ill. App. 836.

⁴ Armstrong v. McDonald, 10 Barb. 300.

and there is no privity between the parent and third party.¹ On the other hand, if the contract for the services of the child is made with the parent direct and not with the child, it has been held that the child cannot sue in his own right for the wages, though the parent may have emancipated him or released the right to the wages to the child, and that the action must be by the parent alone.² This, however, would hardly be the rule under the modern code procedure, whereby all actions may be brought and prosecuted in the name of the real party in interest. The child would be the party in interest, and while the parent may have made the contract for him, yet the child may adopt the act of the father in thus representing him, and when he does so his interest in the subject-matter becomes perfect and the parent really has none.³ At any rate, it would seem, upon principle, that the child, being manumitted, would be entitled to the value of his services, and that his parent would not. The parent, having emancipated his child, has no longer a right to his services; the child, being emancipated, clearly has such right; the one has, the other has not. If the parent alone can recover, the child could not; if the child could not, he is denied that which the law gives him; if the parent can, he is given that which the law denies him. And, in any event, it would seem, upon principle, that the child would be entitled to sue for the value of the services in his own right. Under circumstances of this kind, the wages are the property of the infant. And even though the parent should collect same and appropriate them to his own use, or invest same in property, he would be liable, in the one instance, to the infant for conversion, and, in the other, the property which he thus purchased with the funds of the infant would be charged with a trust in favor of the child to the amount of such earnings, and the parent may be required to account to the child accordingly.⁴

¹ *Burlingame v. Burlingame*, 7 Cowen, 92; *Morse v. Welton*, 6 Conn. 547; *Bell v. Bumpus*, 63 Mich. 375, 29 N. W. Rep. 862; *Aulger v. Badgely*, 29 Ill. App. 336; *Zeigler v. Fallon*, 28 Mo. App. 295.

² *Clark v. Pomeroy*, 4 Allen (Mass.), 534.

³ *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. Rep. 506. See, too, *Bell v. Bumpus*, 63 Mich. 375, 29 N. W. Rep. 862; *Jackson's Adm'r v. Jackson* (Va.), 31 S. E. Rep. 78.

⁴ *Jenney v. Alden*, 12 Mass. 375; *Fairhurst v. Lewis*, 23 Ark. 435.

§ 486. Right of father to emancipate — Insolvency of father.— The right of the father to emancipate his infant child in no sense depends upon his financial condition. This right or authority over the child is personal to the parent, and exists regardless of his solvency or insolvency. After he has asserted the right and renounced to the infant his parental dominion, including the right of enjoyment of earnings of the child, the rights of the father in this respect cease, and the creditors claiming in right of the father can assert no right he could not himself assert.¹ Such emancipation is not impaired or affected in the least by reason of the fact that the child may continue thereafter to live with his parents as before.² And it is not at all necessary that the fact of emancipation be proclaimed from the housetops or in any way made public. Neither formalities nor publicity is required.³ The emancipation may be by oral or written declaration, and is as effective when brought about one way as the other.⁴

§ 487. Manumission — Effect of on child's rights.— Whenever the parent emancipates his child, or releases his rights to the earnings of his infant, the child then has both his parent and the creditors of the latter at arm's length.⁵ And the death of the parent always effects the emancipation of the infant. If the infant be working for another by reason of an arrangement between the parent and his employer, he may quit such service at pleasure upon the death of the parent. This severs the re-

¹ *Dierker v. Hess*, 54 Mo. 246, 250; *Hall v. Hall*, 44 N. H. 293; *Halliday v. Miller*, 29 W. Va. 424, 1 S. E. Rep. 821; *Clemens v. Brillhart*, 17 Neb. 335, 22 N. W. Rep. 779; *Armstrong v. McDonald*, 10 Barb. 300; *Atwood v. Holcomb*, 39 Conn. 270; *McCloskey v. Cyphert*, 27 Pa. St. 225; *Winchester v. Reid*, 8 Jones (N. C.), 379; *Lackman v. Wood*, 25 Cal. 147; *Cloud v. Hamilton*, 11 Humph. (Tenn.) 104; *Wambold v. Vick*, 50 Wis. 456. 7 N. W. Rep. 438; *Delaware Co. Nat. Bank v. Headley* (Pa.), 4 Atl. Rep. 464; *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. Rep. 570.

² *McCloskey v. Cyphert*, 27 Pa. St. 220.

³ *Dierker v. Hess*, 54 Mo. 246.

⁴ *Wilson v. McMillan*, 62 Ga. 16; *Pennsylvania v. Whitehead*, 17 Gratt. (Va.) 503; *Halliday v. Miller*, 29 W. Va. 424; *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. Rep. 570.

⁵ *Jenison v. Graves*, 2 Blackf. (Ind.) 440; *Chase v. Ellis*, 2 Vt. 290; *Delaware Co. Nat. Bank v. Headley* (Pa.), 4 Atl. Rep. 464; *Atwood v. Holcomb*, 39 Conn. 270; *Francisco v. Benepe*, 6 Mont. 243, 11 Pac. Rep. 637; *Bener v. Edington*, 76 Iowa, 105, 40 N. W. Rep. 117; *Clemens v. Brillhart*, 17 Neb. 335, 22 N. W. Rep. 779; *Dierker v. Hess*, 54 Mo. 246; *Hall v. Hall*, 44 N. H. 293.

lation of master and servant between the parent and child, and the employer, who receives his right to the services of the infant through the parent, and by virtue of the right of the latter to the same, necessarily loses such right to the services the instant the parent does, which of course takes place at the death of the parent, and the child may then quit the same at pleasure.¹ And in such cases the actual quitting of the services is conclusive of the intention of the infant to assert the right to do so.² But until the father does release his right to the services of his infant, either by his own volition or by death, the earnings of the child are liable for, and may be appropriated in due course of law to, the payment of the creditors of the parent.³ But merely allowing a child to have and control his own wages is by no means a complete emancipation of the infant.⁴ And the mere fact that the parent permits the child to leave home, take work and support himself from his earnings while away does not amount to a full emancipation of the child where there is a mutual intention and expectation that the child will return to the parental roof; and such temporary absence of the child does not even serve to give him a different domicile than that of his parents.⁵ The father may also release the services of the child to his mother as well as to the child himself, and when released to the mother, the earnings of the child, as well as property acquired by the mother therewith, cannot be reached by the creditors of the father, where the wife may, by law, hold property regardless of coverture.⁶ In other words, the mother, in such instances, succeeds to the same rights the child would take where the father renounced the earnings of the child to him.

§ 488. Emancipation — Effect of marriage of infant.— The general rule is, where an infant has arrived at the age at which, by law, he may legally enter into a contract of marriage, or if, not having arrived at the age when he might lawfully marry without the consent of his parents, this is given, the effect of

¹ Campbell v. Cooper, 34 N. H. 49.

² Campbell v. Cooper, 34 N. H. 49.

³ Bell v. Hallenback, Wright (Ohio), 751.

⁴ Delaware Co. Nat. Bank v. Headley (Pa.), 4 Atl. Rep. 464.

⁵ Seasmont v. Thorndike, 77 Me.

504, 1 Atl. Rep. 448.

⁶ Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. Rep. 570.

such a marriage, whether the child be male or female, is to bring about a complete emancipation. For the duties of the parties in this new state, whether one or both are infants, are entirely inconsistent with those of a child. The husband then owes to his wife the duty of support and is liable for her necessities. The wife owes to the husband her services, society and companionship, and both may become charged with the duties and obligations of parents before either shall have arrived at majority, and their duties towards each other as well as their offspring are paramount to those which they owe their parents. Both duties cannot be carried out, and, as the law sanctions the marriage, it affords all the opportunities necessary to fully live in, and perform the duties of, that state.¹ Of course, where an infant marries before he attains an age at which he may lawfully enter into such a contract without the consent of his parents, or if the consent of the parents be made not necessary by law before he arrives at the age at which he may lawfully marry under the common law, he will not be emancipated by the marriage, and an attempt on his part to marry will not forfeit any of the control of the parents over him, nor in fact deprive them of any legal right concerning the infant. And if a parent permits his married infant to live with him as before the marriage, he can recover nothing for the support furnished such child while so living with him during the minority of the infant.² While the legal marriage of an infant relieves him from filial duties and parental control, yet such a marriage does not do away with the liabilities of infancy fixed by law, except that an infant may then contract for necessities for himself and wife for which his estate will be liable. But the marriage of an infant does not cut off his right to disaffirm a contract or to ratify one made during infancy, upon coming of age, or authorize him to convey lands, make contracts

¹ King v. Wilmington, 5 Barn. & Ald. 525; Bradford v. Lunenberg, 5 Vt. 481; Sherburne v. Hartland, 37 Vt. 528; Porch v. Fries, 18 N. J. Eq. 204; Burr v. Wilson, 18 Tex. 367; Northfield v. Brookfield, 50 Vt. 62; Parton v. Hervey, 1 Gray (Mass.), 119; Craftsbury v. Greensboro, 66 Vt. 585, 29 Atl. Rep. 1024; Rex v. Ever-
ton, 1 East, 526; Aldrich v. Bennett, 63 N. H. 415. For a contrary rule in Louisiana, see Babin v. Le Blanc, 12 La. Ann. 367. And see, too, Hewlette v. George, 68 Miss. 703, 9 S. Rep. 885; White v. Henry, 24 Me. 531.
² Perkins v. Westcoat, 3 Colo. App. 338, 33 Pac. Rep. 139.

in general, or do other like acts which can be done only by adults, though he be entirely free from parental control.¹

§ 489. **Manumission — Legal authority to manumit.**—Not only may the parent manumit his child so as to allow him to receive his own wages and control the same, but he may also release his parental control, such as the right to custody of his child and like rights. Within these may be included, too, the authority to correct and supervise the actions and doings of the infant to an extent that would not deprive him of the revocable delegation of the right of custody, or excuse him from those legal duties towards his child which the law will not permit him to evade or shirk, such as the furnishing of necessities of life when needed.² This right, of course, must be confined to the release of any authority which might be to the advantage of the parent. The parent is not required to assert all the privileges which the law allows him; but, at the same time, he can neither repudiate those duties fastened upon him by law by a release of those advantages given him from the same source. The consequences of such an idea are patent. If it were otherwise, the parent could entirely release himself of his parental burdens, which the law always exacts of him, by simply relinquishing his right to parental control of the child. There would then be no legal duty owing a parent to his infant child, however helpless and in need of care, nurture and attention the child might be. Every child would then be at the mercy of the parent. The arbitrary action of the par-

¹ Burr v. Wilson, 18 Tex. 367.

² Varney v. Young, 11 Vt. 258, 260; Phelps, Dodge & Palmer Co. v. Hopkinson, 61 Ill. App. 400; Washington v. Washington (Tex. Civ. App.), 31 S. W. Rep. 88; Bobo v. Bryson, 21 Ark. 887; Fairhurst v. Lewis, 23 Ark. 435; Clark v. Pomeroy, 4 Allen (Mass.), 534; Banks v. Conaut, 4 Allen (Mass.), 497; Lubec v. Eastport, 3 Greenl. (Me.) 220; Gale v. Parrot, 1 N. H. 28; Hunstoon v. Hazelton, 20 N. H. 888, 390; Canovar v. Cooper, 3 Barb. 115; McCoy v. Huffman, 8 Cowen, 84, 85; Taylor v. Welsh, 92 Hun, 272, 36 N. Y. S. 952; Jenison v. Graves, 2 Blackf.

(Ind.) 440; Holliday v. Miller, 29 W. Va. 424, 1 S. E. Rep. 821; Furrh v. McKnight, 6 Tex. Civ. App. 583, 26 S. W. Rep. 95; Whiting v. Earle, 3 Pick. (Mass.) 201; Morse v. Welton, 6 Conn. 547; Dennysville v. Trescott, 30 Me. 470; Wells v. Kennebunk, 8 Greenl. (Me.) 200; Woodell v. Coggshall, 2 Met. (Mass.) 89; Smith v. Smith, 30 Conn. 111; Shute v. Dorr, 5 Wend. 204; Stiles v. Granville, 6 Cush. (Mass.) 458; Dick v. Grissom, 1 Freem. Ch. 428; Allen v. Allen, 60 Mich. 635, 27 N. W. Rep. 702; Haugh & C. Iron Works v. Duncan, 2 N. E. Rep. 264.

ent to remit all his right to earnings, custody and kindred parental rights would deprive the child of the right to a subsistence, unless perchance some others, more charitable than the parents, might see fit to take the part of the helpless infant and lend the necessary support and sustenance. It is therefore contrary to the policy of the law for a parent to surrender or renounce all parental duty towards his child, and his right of manumission can never be carried further than to effect a release of those privileges which are personal to the parent and for his benefit, and can never be effective to the extent that it would relieve the parent of his imposed parental duty to his infant-offspring.

§ 490. Emancipation — Right of parent to revoke.— The right of a parent to revoke the manumission of his child once made is a question upon which the authorities are not entirely agreed. It has been held that an agreement of this nature, by and under which the child has earned and become entitled to wages, cannot be revoked by the parent so as to cut off the right of the child to services already rendered and wages earned, for the infant has a vested right to these.¹ It is held in Massachusetts that a mere parol agreement of manumission is revocable at the pleasure of the parent where the revocation takes place before being acted upon.² It has also been held, where both parent and child were insane, and especially if the child be a bastard, the infant is emancipated by operation of law, as the parent is incapacitated by this disability to intelligently exercise the functions of a parent, and he becomes to the child as though he were dead.³ If the insanity be incurable and permanent, this would effect the permanent manumission of the child so far as the parent is concerned, for here the parent is permanently incapacitated from discharging his duties as such, and the rights and privileges of a parent go hand in hand and exist together or not at all. As to the right of a parent to revoke a manumission, it would seem from principle that this can, ordinarily at least, be done. There appears

¹ *Torrens v. Campbell*, 74 Pa. St. 470; *Dunks v. Grey*, 3 Fed. Rep. 862, 866.

² *Clark v. Pomeroy*, 4 Allen (Mass.), 534.

³ *Sidney v. Winthrop*, 5 Greenl. (Me.) 123; *Jenness v. Emerson*, 15 N. H. 486, 490.

no good reason why the parent should continue the manumission when in his judgment it is best for the child that it be revoked and entire parental control be again assumed. Of course, as has been seen, this right cannot be asserted to defeat vested rights, but aside from this there is no good reason why a parent may not, at his pleasure, revoke the license he has given his child. That a parent may confide the care and custody of his child to another is well settled. That he cannot bind himself never to assert his right of custody again is equally well settled, because a contrary idea is against public policy, which fixes upon the parent so many duties to his infant child. The parent, after giving the custody of his child to a friend, may become convinced that it is not for the interest of the infant to remain away from his care and control. When this is the case, he may, at his pleasure, assert his right to retake it. It may be, upon a like principle, that a parent who has manumitted his child observes that the child is not doing well for himself in his emancipated condition. It may tend to bring on habits of dissipation or evil associations. It is to the interest of both parent and child to avoid all such influences. When, therefore, the parent is satisfied, in the exercise of a sound discretion, that a state of manumission is not for the best or permanent interest of the infant, it is difficult to see why he should be forbidden the right to retake his child and bring him up under the influence of proper and wholesome training.

§ 491. Duty of support — Right of third person to recover from parent for support of child.—The relation of parent and child seems to be one ordained by nature, and the duties of the parent to support his infant child are dictated by natural instincts. That the child should be able to look with confidence and assurance to some one for care and support seems most reasonable and natural. That there are none to whom it would more naturally look than to its parents is equally natural. That a parent who brings a child into the world would naturally expect to nurture and support it during the helpless period of infancy, and especially early infancy, is also natural. That the moral duty exists goes without saying. The law, too, following the moral duty as well as the dictates of hu-

manity, and considering the welfare of the helpless child, and indirectly the usefulness of the mature citizen and consequent advantage to the state of maintaining children in infancy in a manner that will make them most useful and honorable as citizens of the state, in looking about for a suitable person upon whom to fasten the duty of care and support, finds none more suitable than the natural parent, and upon the principle of natural justice and natural law fixes upon the parent the sacred duty of supporting his infant children. This moral and legal duty is strengthened by the instinct of love, affection and concern instilled by the Creator into the parent for the welfare of his natural children, and the duty to support during infancy is well established.¹ Some cases, it is true, have held or intimated a contrary doctrine.² A few scattering cases in the English reports may be found to the same effect. Most of these, however, proceed upon the theory that there is no legal, but only a moral, duty resting upon a parent to support his child, and that in the absence of an express promise to pay for supplies and necessities, and support in general as well, there is no liability. Under such a rule, a child might be abandoned by its parent to starvation unless the parent should either furnish sustenance or authorize some one else to do so at his expense. Such is not the law in this country, and if it were it would be shocking to the sense of propriety and natural justice.

¹ *Raymond v. Loyl*, 10 Barb. 488; *Van Valkenburg v. Watson*, 13 Johns. 480; 1 Bl. Comm. 446, 447; *Tompkins v. Tompkins*, 3 Greene (N. J. Eq.), 303; *Newport v. Cook*, 2 Ashm. (Pa.) 332; *Meyers v. Meyers*, 2 McCord (S. C.), 214, 255; *Dupont v. Johnson*, 1 Bai. (S. C. Eq.) 279; *Crantz v. Gill*, 2 Esp. 471; *Morse v. Welton*, 6 Conn. 547; *Gilley v. Gilley*, 79 Me. 292, 9 Atl. Rep. 623; *In re Burke*, 1 Sandf. Ch. 617; 2 Kent, Comm. 190, 191; *Chilton v. York*, 26 Me. 167; *Dewane v. Hanson*, 56 Ill. App. 575; *Bedford v. Bedford*, 32 Ill. App. 455, 26 N. E. Rep. 662; *Dennis v. Clark*, 2 Cush. (Mass.) 352, 353; *Benson v. Remington*, 2 Mass. 113; *Bauman v. Bau-*

man, 18 Ark. 321, 333; *Dawson v. Dawson*, 12 Iowa, 513; *Porter v. Powell*, 79 Iowa, 151, 44 N. W. Rep. 295; *Lapworth v. Leach*, 79 Mich. 16, 44 N. W. Rep. 338; *Stanton v. Wilson*, 3 Day (Conn.), 37; *State v. Smith*, 6 Me. 462, 464; *Reynolds v. Sweetser*, 15 Gray (Mass.), 78; *Hillsboro v. Deering*, 4 N. H. 86, 93; *Brow v. Brightman*, 136 Mass. 187; *Cromwell v. Benjamin*, 41 Barb. 558; *In re Ryder*, 11 Paige, 185; *Garland v. Dover*, 19 Me. 441; *Furnam v. Van Sise*, 50 N. Y. 435, 439, 445, 446; *Nightingale v. Withington*, 15 Mass. 274.

² *Farmington v. Jones*, 36 N. H. 271; *Kelly v. Davis*, 49 N. H. 187; *Gordon v. Potter*, 17 Vt. 348, and others.

§ 492. **Duty of parent to support — Right of third persons to recover from parents — Rule where child is cared for by stranger.**— Ordinarily, where a child is taken by a third person to live in his home as a natural child, or to be reared by such third person, whether the stranger be a relative or otherwise, the third person thus taking the child receiving the benefit of what domestic services it may render, and, in turn, affording it support, supplies and general necessities, there is no right of recovery from the parent; that is, none in the absence of a special promise on the part of the father to pay for the same. There is no presumption from these facts that such was the intention of the parties, as such a presumption would be inconsistent with the facts unexplained. Nor is it enough that the parent passively consent that the child be taken and reared by the stranger; there must be an express or implied agreement or undertaking on the part of the parent to pay therefor.¹ But a relative or other stranger cannot take a child and raise it from motives of charity and without any intention of making any charge for so doing against the parents, and, after doing so, upon the parent becoming possessed of a fortune or the happening of other events, and after raising the child without the intention to make a charge, conclude to do so and bind the parent for the support furnished under such circumstances.² Though where a child is taken by a stranger with the consent of the parents for the purposes of adoption, and after living with the stranger thus for a time, the parent retakes it and refuses to abide by his promise to let the child remain in its new relation, the third person may recover from the parent for the support of the child from the time he received it until retaken by the parent, though there was no express or implied contract to pay for the support.³ But before the stranger thus situated may charge the natural parent for

¹ *Fetrow v. Krause*, 61 Ill. App. 238; *Young v. Heater*, 63 Iowa, 668, 19 N. W. Rep. 827; *McLaughlin v. McLaughlin*, 150 Pa. St. 489, 28 Atl. Rep. 502.
Jackson v. Mull (Wyo.), 42 Pac. Rep. 603; *Burns v. Madigan*, 60 N. H. 197; *Gordon v. Potter*, 17 Vt. 348; *Judge, etc. v. Barrows*, 59 Wis. 115, 17 N. W. Rep. 540; *Witzmann v. Koerlier*, 28 Ill. App. 174; *Chilcott v. Trimble*, 13 Barb. 502; *McMillen v. Lee*, 78 Ill. 443; *Duffy v. Duffy*, 44 Pa. St. 399;

² *Everett v. Walker*, 109 N. C. 129, 13 S. E. Rep. 860.

³ *Taylor v. Deseve*, 81 Tex. 246, 16 S. W. Rep. 1008; *Goetschin v. Hunt*, 52 Hun, 613, 5 N. Y. S. 307.

support of the child he must either restore the infant to its natural parents or give proper notice that he will no longer keep the child in the character of a *quasi*-parent.¹ And in all cases of this kind the question of liability for support, where the evidence is conflicting, is one of fact for the jury or court trying the case.² The courts, however, are very zealous in enforcing the obligation of a parent to support his child, and, usually, slight evidence of an intention to pay a stranger for support will suffice.³ And if the parent requests another to take his child and raise it, this will imply an intention on the part of such parent to pay for such raising, as the law imposes the duty on him to rear it, and does not impose any duty upon the stranger so to do.⁴ The moral obligation of a parent to support his natural child is always regarded as a sufficient consideration upon which to ground a promise to pay another for such support, whether the promise be express, or implied from circumstances.⁵ And under a contract of this nature the obligation is continuing, and the statute of limitations does not begin to run until there is such a change in the condition of things as would make the parent no longer liable.⁶ But a third person will not be permitted to recover from a parent for support furnished a child while detained from the parent against his will. Upon this principle it has been held that, where a daughter who was residing temporarily at the house of a friend with the consent of her parents, and while there was taken sick with the small-pox, the house in which she stayed being converted into a pest-house by the authorities, where she was kept until recovery and refused permission to go home, there could be no recovery by the town authorities thus detaining her against her consent, as well as against that of her parents, for medical services and other necessary attention given her while thus detained.⁷ In other words, the right of the care, custody

¹ *Chilcott v. Trimble*, 13 Barb. 502, 507; *Witzmann v. Koerber*, 28 Ill. App. 174, 177.

² *Dutton v. Seevers*, 89 Iowa, 302, 56 N. W. Rep. 398; *Parker v. Tillinghast*, 19 Abb. N. C. 190; *Koch v. Hobel*, 32 Mo. App. 103; *Bell v. Rice* (Neb.), 70 N. W. Rep. 25.

³ *Jordan v. Wright*, 45 Ark. 237. See also *Dutton v. Seevers*, 89 Iowa, 302, 56 N. W. Rep. 398.

⁴ *Jordan v. Wright*, 45 Ark. 237; *Yerteau v. Bacon's Estate*, 65 Vt. 515, 27 Atl. Rep. 198.

⁵ *Yerteau v. Bacon's Estate*, 65 Vt. 516, 27 Atl. Rep. 198; *Jordan v. Wright*, 45 Ark. 237.

⁶ *Jackson v. Mull* (Wyo.), 42 Pac. Rep. 603.

⁷ *Farmington v. Jones*, 36 N. Y. 271.

and control of a child by the parent goes hand in hand with the duty of support.

§ 493. Right of third persons to recover for support exists only when parent fails to perform his duty.—A third person has no right to meddle with the furnishing of support by the parent. He has no such duties toward the child and the public in general as has the parent, nor has he such an interest in the welfare of the child as to be superior to that of the parent. His omission to furnish any support is no disregard of any duty, while the omission of the parent to do so is. The parent, therefore, has the right to supervise and manage as well as direct the furnishing of necessities to his child, and is not brought under the consequences of the law until he improperly fails to perform his duty. It is not the province of a stranger to look after this duty. A third person can only furnish a child necessities when the father fails to do so and when it becomes necessary for the interest and welfare of the child that the same be furnished. Otherwise, there is no right of recovery from the parent by one who furnishes anything to an infant without an agreement on the part of the parent to pay for same.¹ And if the support be necessarily furnished by a stranger, the measure of recovery from the parent is the actual value of the articles, and the ability or inability of the parent to pay is an immaterial and irrelevant consideration.² But pauperism is not hereditary. The fact that a parent is poor and unable to provide for either himself or family does not, *ipso facto*, make the infant a pauper also. He may be able to make his own support or even more, and, as no recovery can be had from the father, if a pauper, so none can be had for support of an infant of this kind from public institutions, unless the infant, by reason of his tender years or other disability, is not capable of earning his own sustenance.³

§ 494. Support — When duty ends.—The duty devolved by law upon a parent to support his infant child is not a permanent legal duty regardless of the age of the child. For, were

¹ Crantz v. Gill, 2 Esp. 471.

³ Jenness v. Emerson, 15 N. H. 486.

² Leisemer v. Burg (Mich.), 68 N. W. Rep. 999.

this true, a father who has arrived at his dotage and is old, decrepit, feeble, infirm and practically incapable of either physical or mental labor, would be compelled to support and keep up a child grown to the full vigor of manhood, and who might himself be enjoying the highest possibilities of mental and physical development and the incidental ability to, and fitness for, work from either a physical or mental standpoint. It is the rule, therefore, that when the child arrives at the age of twenty-one years or other age fixed by law, when the majority is attained the duty of the parent to support, whether the child be male or female, is at an end.¹ The poverty or wealth of the child does not, in any sense, alter the rule. The duty of support by the parent ceases absolutely upon the arrival of the child at majority.² So a parent is not liable to a third person who furnishes necessary medical attention to his adult child in sickness, and this is true though the child be sick at the house of the parent at the time and be actually living with his father as a member of his family.³ Nor is the father liable for clothing actually necessary, where furnished after the majority of the child.⁴ But while the legal duty of the parent to support his child ends with the majority of the infant, he will nevertheless be liable for any necessities furnished his adult child at his express or implied request.⁵ But the fact that the father may be liable for necessities sold or furnished his adult child at his express or implied request does not affect the liability of the child himself, and for these the full-grown infant may be chargeable, though the father, when he agrees to pay for same, may

¹ *Porter v. Powell*, 79 Iowa, 151, 44 N. W. Rep. 295; *Norris v. Dodge's Adm'r*, 23 Ind. 190; *Mills v. Wyman*, 8 Pick. (Mass.) 207; *Townsend v. Burnham*, 33 N. H. 270; *Wood v. Gill's Ex'rs*, 1 N. J. Law, 449; *Monroe Co. v. Teller*, 51 Iowa, 670, 2 N. W. Rep. 421; *Blackley v. Laba*, 63 Iowa, 22, 18 N. W. Rep. 658; *Boyd v. Sappington*, 4 Watts (Pa.), 247; *Mt. Pleasant v. Wilcox*, 12 Pa. Co. Ct. Rep. 447.

² 1 Bl. Comm. 450; 2 Kent, Comm. 191, 192; *In re Ryder*, 11 Paige, 185. This last case was a petition in chancery by an able-bodied adult son, fully

capable of making a sustenance for himself, to compel his mother, who was a lady of means, to furnish him money with which to get a professional education. The court very promptly and properly denied the relief asked.

³ *Blackley v. Laba*, 63 Iowa, 22, 18 N. W. Rep. 658.

⁴ *White v. Mann*, 110 Ind. 74, 10 N. E. Rep. 629.

⁵ *Ellenbarger v. Swiggett*, 1 Ind. App. 518, 28 S. E. Rep. 110; *Loomis v. Newhall*, 15 Pick. (Mass.) 159; *Kernodle v. Caldwell*, 46 Ind. 153.

likewise become liable.¹ But the mere request by a parent to a third person to render his adult child a necessary service, as medical attention, or other like necessary service, raises no presumption of an agreement by the parent to pay for same.² And the parent is not bound for anything furnished his adult child, even upon his express promise to pay for same, where the promise was made after the goods were furnished the child, as this would be an undertaking to answer for the debt of another and within the statute of frauds.³

§ 495. Parent and child — Step-children — Duty to support.—The duty of a parent to support his child being grounded upon the supposition that he will entertain that natural love and affection which would prompt the fulfillment of this duty, as well as upon the reciprocal advantages of the services of the child during infancy, extends only to children who are immediate heirs by consanguineous descent. Hence a parent is under no legal obligation to support a step-child. He has no right to the services of such, and in the eye of the law there is no natural nor moral duty, as a general rule, so to do.⁴ And as a man is not bound in law to maintain the children of his wife by another, he certainly is not bound to maintain, care for, or in any way support his wife's mother — his mother-in-law, in other words.⁵ On the other hand, a child is under no legal obligation to serve or support his father-in-law or mother-in-law.⁶ There is no mutuality of duties between parties thus

¹ *Brewer v. Warner*, 126 Pa. St. 151, 19 Atl. Rep. 35.

² *Boyd v. Sappington*, 4 Watts (Pa.), 247.

³ *Ellenbarger v. Swiggett*, 1 Ind. App. 598, 28 N. E. Rep. 110.

⁴ *Boyd v. Jones* (Ky.), 2 S. W. Rep. 552; *Smith v. Rogers*, 24 Kan. 140; *Brookfield v. Warren*, 128 Mass. 287; *Hussey v. Roundtree*, Busb. (N. C.) 110; *Gerber v. Bauerline*, 17 Oreg. 115, 19 Pac. Rep. 849; *Pelley v. Rawlings*, Peake's Add. Cas. 226; *Tubb v. Harrison*, 4 T. R. 118; *Sharp v. Cropsy*, 11 Barb. 224; *Freto v. Brown*, 4 Mass. 675; *King v. Benoier*, 2 Ld. Raym. 1454; *Bond v. Lockwood*, 33 Ill. 212; *Mow-*

bry v. Mowbry, 64 Ill. 383, 388; *Worcester v. Marchant*, 14 Pick. (Mass.) 510; *Williams v. Hutchinson*, 3 N. Y. 312; *Williams v. Hutchinson*, 5 Barb. 123; *Gay v. Ballou*, 4 Wend. 403; *Cooper v. Martin*, 4 East, 76; *Minden v. Cox*, 7 Cowen, 235; *Bartley v. Richtyer*, 4 N. Y. 38; *Brown's Appeal*, 112 Pa. St. 18, 5 Atl. Rep. 13; *In re Besondy*, 32 Minn. 385, 20 N. W. Rep. 366.

⁵ *Rex v. Munden*, 1 Str. 190 (the correct title of this case seems to be *Rex v. Munday*, instead of *Munden*); *Tubb v. Harrison*, 4 T. R. 118, 119; *Stone v. Carr*, 3 Esp. 1.

⁶ *King v. Benoier*, 2 Ld. Raym. 1454.

related. Neither need serve nor support the other, and neither may demand, as a legal right, the service or support of the other. They are strangers in blood, and the duties of parent and child do not devolve upon persons who are not related by consanguinity, as a rule.

§ 496. Duty of parent to support step-children — Exception to the general rule.— While the parent, generally speaking, is not liable for the education, support and maintenance of a child not of his own blood, yet if he receives a step-child into his family as a member of his household, and the step-child demeans himself as, and complies with the ordinary duties of, a natural child, the parent will be liable for his necessary support. By receiving the child into his family, the parent undertakes to, and does, stand *in loco parentis* towards such child, and the law imposes on him, in such instances, the duty of suitably providing for the maintenance and support of the child thus received into his family.¹ And when a child is thus received into the home of the step-father, where he renders such parent the ordinary domestic services rendered by children to their natural parents, the law will presume, in the absence of proof, that the parent is to receive such services, and the child to render same in consideration of support.² The step-child, however, may at any time leave his step-father, though against the will of the latter, and when he elects to do so, and acts

¹ Bond v. Lockwood, 33 Ill. 212; Larsen v. Hansen, 74 Cal. 320, 16 Pac. Rep. 5; Robinson v. Cushman, 2 Denio, 149; In re Besondy, 32 Minn. 385, 20 N. W. Rep. 366; Mowbry v. Mowbry, 64 Ill. 383, 388; Stone v. Carr, 3 Esp. 1; 2 Kent, Comm. 129; Gay v. Ballou, 4 Wend. 403; Tubb v. Harrison, 4 T. R. 118; Livingston v. Hammond, 162 Mass. 375, 38 N. E. Rep. 968; Fitch v. Peckham, 16 Vt. 150; Andrews v. Foster, 17 Vt. 556; Hussey v. Roundtree, Busb. (N. C.) 110; In re Ackerman, 116 N. Y. 654, 22 N. E. Rep. 552; Murdock v. Murdock, 7 Cal. 511; Smith v. Rogers, 24 Kan. 40; Davis v. Goodenow, 27 Vt. 715; Cooper v. Martin, 4 East, 76; Freto v. Brown, 4

Mass. 675; Mulhern v. McDavitt, 16 Gray (Mass.), 404; Gillett v. Camp, 27 Mo. 541; Lantz v. Frey, 14 Pa. St. 201; Brush v. Blanchard, 18 Ill. 460; Rex v. Munden, 1 Str. 190; Oxford v. McFarland, 3 Ind. 156; Sharp v. Cropsy, 11 Barb. 224; Williams v. Hutchinson, 3 N. Y. 312; Resor v. Johnson, 1 Ind. 100; Luney v. Vantine, 40 Vt. 501; Brown's Appeal, 112 Pa. St. 18, 5 Atl. Rep. 13; Gerdes v. Weiser, 54 Iowa, 591, 7 N. W. Rep. 42.

² Sharp v. Cropsy, 11 Barb. 224; Van Kuren v. Saxton, 3 Hun, 547; Williams v. Hutchinson, 5 Barb. 122; Ellis v. Carey, 74 Wis. 176, 42 N. W. Rep. 252; Grossman v. Lauber, 29 Ind. 618.

upon his election, the parties at once become to each other as strangers.¹ It would seem to follow, therefore, upon principle, that the step-father may at any time renounce the *quasi*-relation of parent and child established by receiving the step-child into his family; for the rights of parent and child are mutual, and the duties each owes to the other rest upon the reciprocal duties and obligation of support and service. And if the step-child may at any time, and against the will of the step-father, quit his service, it would seem to necessarily follow that the step-father could require such child to leave his family with like effect. Were it otherwise, the child could exact greater duties of the step-parent than such parent could of the child, when in law the duty to support and serve are companion duties, and the child certainly has no greater right to renounce his fealty to his master than the master to renounce his duty of support towards the child.

§ 497. Duty of mother to support—General rule.—So long as the father lives, the general rule touching the duty of a mother to support her infant child is that she is not required to do so. When the father is taken away by death, however, the duty to lend support shifts to the surviving parent—the mother. She is then entitled to the custody and control of the minor child as against the world, as well as to the earnings of the infant, just as the father would be if he were alive. And this being true, the law imposes the corresponding duty upon the mother, in such case, to support her infant children in a manner fitting their station in life, not beyond her ability to do so, however.² Some authorities, though, hold squarely that the mother is not liable for the support or nurture of her children in any event.³ The learned Chancellor Kent seems to have adhered,

¹ *Freto v. Brown*, 4 Mass. 675.

² 2 Kent, Comm. 191, 192; *Gilley v. Gilley*, 79 Me. 292, 9 Atl. Rep. 623; *Jenness v. Emerson*, 15 N. H. 486, 490; *Ohio & M. R. Co. v. Tyndall*, 13 Ind. 366; *Cooper v. McNamare*, 92 Iowa, 243, 60 N. W. Rep. 522; *Savannah, F. & W. Ry. Co. v. Smith*, 93 Ga. 742, 21 S. E. Rep. 157; *Freto v. Brown*, 4 Mass. 675; *Commonwealth v. Hamil-*

ton, 6 Mass. 273; *Gray v. Durland*, 50 Barb. 100, 211; *Kennedy v. New York C. & H. R. R. Co.*, 35 Hun, 186; *Mowbry v. Mowbry*, 64 Ill. 383; *Dedham v. Natick*, 16 Mass. 135; *Wilkes v. Rogers*, 6 Johns. 566, 586; *Mauerman v. St. Louis, I. M. & S. Ry. Co.*, 41 Mo. App. 348; *Freybe v. Tiernan*, 76 Tex. 286, 13 S. W. Rep. 370.

³ *Kelly v. Davis*, 49 N. H. 147; *Com-*

in a sense, to the doctrine of non-liability of the mother, at least after she should marry the second time. The position, however, is not well taken. In the nature of things the mother or father must be liable for necessities and support of their infant children. It is they who bring them into the world, and the natural sense of justice and propriety revolts at the idea of refusing an infant care and support at the hands of the mother, the father being dead. If the mother is under no obligation to support her fatherless child, who can be charged with such duty? Must the child become a pauper because his father has died? Certainly no stranger can be required to maintain the child unto maturity. Then in what condition is the child left? Must it suffer because of the lack of educational training, and from a denial of necessary support at the hands of its mother, simply because the father died first? Must it be reared in ignorance and neglect when it has a natural parent on whom the burden of sustaining it should rest? If this is true, it is a disgrace and reproach to the law. It is true that at common law, upon the marriage of a woman, the husband took her personal property and an estate in her realty for life; and it is logical that if a widow marry, as they often do, though before the second marriage she have an abundant property, yet the instant the hymeneal contract is consummated all this, to the extent indicated, went to the husband, and during his life the wife could claim no part of the property, not even the rents and profits of the realty. And as the law does not require parents to attempt impossibilities to support their children, whether the parent be the father or mother, it was reasonable to hold that when a widow married she could not be required to support her children by a former husband, because her second husband took her estate and made this impossible,—all of which was accomplished by operation of law and because of no fault of either the child or mother. But such a rule cannot be sustained upon principle at this day, where, in practically all the states, the wife keeps her property which she has at her marriage, and the husband, barring the estate by the curtesy, has no more actual right to control, manage or dispose of any of the property of the wife which she owned at the time of marriage, or which may have come to her after marriage, than any stranger would have. This being true, the

second marriage of the wife does not disable her to care for her children if she was able so to do at the time of such second marriage. She is just as able to discharge this duty after such a second marriage as before. The uses and profits of her property are now to her sole and separate use, as a general rule, and there being no longer any reason for a contrary rule, the old idea is now rarely or never adhered to except where the common law has not been changed with reference to the property rights of the wife and the rights of the husband in the same by virtue of his marriage. This position is vindicated in a very learned, logical and convincing opinion of the New Jersey court of chancery in the case of *Alling v. Alling*,¹ where the authorities are reviewed and discussed at length in a very masterly and satisfactory manner. Even under the common law, the weight of authority is that the mother was required to support her infant child after the death of the father so long as she remained single and had property with which to do so, though, of course, if she did not have the means, the courts could not compel her to work and acquire same for this or any other purpose. But the law fixed a liability and charge upon whatever property the mother might own during widowhood, and the same might be proceeded against to satisfy any liability accruing to any one for the proper necessities and supplies for the child.² Questions of some importance might arise here, where the rights of the second husband to the property of the widow might conflict with the right of the child to necessities out of the estate of his mother. For instance, suppose a stranger, knowing the mother had property liable for the necessities of the child, should furnish them in reliance upon this fact, the mother failing and neglecting to do her duty in this particular. Who would be entitled to the property of the widow,—the stranger who has thus furnished the supplies, or the hus-

monwealth v. Murray, 4 Bin. (Pa.) 487; Whipple v. Dow, 2 Mass. 415. In this last case the child had means and the mother was poor and unable to support him. See further along the same line, Gordon v. Potter, 17 Vt. 348; Mortimer v. Wright, 6 M. & W. 482; Saulsbury v. Philadelphia, 44 Pa. St. 303; Pyatt v. Pyatt, 46 N.

J. Eq. 285, 18 Atl. Rep. 1048, qualified, however, by the later case of *Alling v. Alling*, 52 N. J. Eq. 92, 27 Atl. Rep. 659.

¹ 52 N. J. Eq. 92, 27 Atl. Rep. 655.

² Wilkes v. Rogers, 6 Johns. 566; Billingsley v. Critchet, 1 Brown, Ch. 268; Pulsford v. Hunter, 3 Brown, Ch. 416; Haley v. Banister, 4 Madd. 275.

band who, by operation of law, takes the property of the wife under the common-law rule? The correct solution of this question would seem to be that while the stranger would have a right to resort to the property of the widow, his right would not be paramount to that of the husband acquired by marriage, unless he had proceeded to judgment and execution, or some other means, to fix a lien or charge upon the property by which he would obtain a vested right of some kind; for the absolute right of the husband takes effect upon the marriage, and unless there be such a charge or lien fixed against the property of the widow as to amount to a vested right in some way, or the husband has estopped himself from asserting his right as against the stranger who has thus furnished necessities for the child of the widow, the husband would take the paramount title.

§ 498. Duty of mother to support — Child's earnings.— At common law the mother has no right to the services of her infant child nor the value thereof so long as the father lives. Until his death he alone is liable for necessities for the child, and has, in return, the right to the use and enjoyment of the services or earnings of the child during infancy. But when the father dies these rights and duties, respectively, are transferred by operation of law to the mother. She then becomes entitled to the custody, control and earnings or services of her minor children to the same extent as was the husband and father before his death. She is then charged, too, with the corresponding liability and duty to support and properly care for them. For, were it otherwise, the children might be left helpless in the world, since, while the father must support them as long as he lives, yet his estate is not liable for their support after his death, and he may bequeath all his property to a stranger if he sees fit so to do. The mother, therefore, the father being dead, must support her infant children and is entitled to their services during infancy.¹ But an insane mother is under no obligation, legally, to support her infant children where she has no property that could be thus applied, and in such a case, con-

¹ *Nightingale v. Withington*, 15 675; *Hammond v. Corbett*, 50 N. H. Mass. 272; *Hargan v. Pacific Mills*, 501. See also *Franz v. Riehl*, 4 Pa. 158 Mass. 402; *Freto v. Brown*, 4 Mass. Dist. Rep. 627.

sequently, she is not entitled to their earnings.¹ Being incapable of rendering the duties of a parent, no corresponding right to serve is imposed. And, as a general rule, the mother has no power or control over the estate of her infant child, though the father be dead, and she be entitled to his earnings during minority;² for the individual estate of an infant is not liable for his support or necessities except in extraordinary instances.

§ 499. Duty of mother to support—Rule where the mother has no property.—The mother is required by law to support her natural children during infancy, to the extent that she reasonably can, when the husband and father is dead. If she has an estate of any kind by which, upon an equitable sharing of it with the infant child having no father, he may be thus reared and supported under the wing of the natural parent, this will be required of her. If by reason of misfortune or other extraordinary cause the mother cannot support her infant, he may find work where he can, and take his earnings and appropriate them to his support and necessities in general. Upon this principle it is held, where the mother was a pauper and detained in the home for the poor by public authority, by reason of which misfortune she became incapable of exercising parental control or discipline over her child, that he might hire himself for wages, appropriate them to the payment of his support, and keep, use and control as his own any surplus remaining after so doing.³ In Iowa, by statute, it is provided that both husband and wife must support their infant children.⁴ This statute leaves no doubt of the duty of the wife when the husband is dead; for the refusal of one parent to lend support, or his or her inability to do so, would be no justification in the other to fail to give the necessary support and sustenance. This statutory rule, of course, changes the old law whereby the father, only so long as he lived, was liable for the support and maintenance of his infant children.

¹ *Jenness v. Emerson*, 15 N. H. 486.

² *Kline v. Beebe*, 6 Conn. 494.

³ *Jenness v. Emerson*, 15 N. H. 486.

⁴ Code Iowa, § 2214; *Johnson v. Barnes*, 69 Iowa, 641, 29 N. W. Rep.

759. See also *Courtwright v. Courtwright*, 53 Iowa, 57, 4 N. W. Rep. 358; *Patterson v. Hill*, 61 Iowa, 535, 16 N. W. Rep. 599.

§ 500. Duty of parent to support—Rule where parent drives child from home or abandons it.—Whenever a parent becomes so depraved and lost to both moral and legal duty as to drive his child away from home or abandon it to neglect, the law promptly comes to the relief of the child and attends it with a letter of credit, as it were, from the parent, for such necessities as are proper. It makes no difference how reluctant the guilty parent may be to honor the same, the law compels him to pay for support and necessities generally incident to infancy which may be furnished the child by a stranger or third person. Indeed, it would be a reproach to the law and justice to permit a parent to free himself from his natural, moral and legal duty to properly care for his child by simply abandoning it to fate or driving it from home.¹ So solicitous is the law for the welfare of the child under such circumstances that the legislatures of some states have passed stringent positive laws imposing this duty and punishing its neglect. In Georgia it is a criminal offense for a father to abandon his infant child, whereby it is left in a destitute condition;² though before a conviction can be had under this statute it is necessary to show not only the abandonment, but that by reason thereof the child is left destitute and without the necessities of life or proper protection.³ Under this statute, however, the child may be abandoned, within the meaning of the law, before it is born, where the abandonment is followed up after birth.⁴ But the abandonment must occur in the state. It is not sufficient that it occurred elsewhere, even though the mother and child follow the father to Georgia, where he still fails to care for either.⁵ And under a statute in Wisconsin making the abandonment of a child by his parent a criminal offense, it must be shown, before conviction can be had, that the child which has been abandoned was legitimate.⁶ The statute, being criminal, must of course be strictly followed, and the ordinary definition of a child, as used and intended in the law books, is legitimate child. If, however, the legitimacy of the child is

¹ Hall v. Weir, 1 Allen (Mass.), 261;
Manning v. Wells, 85 Hun. 27.

² Benefield v. State, 80 Ga. 107;
Code Ga., § 4373.

³ Crow v. State, 96 Ga. 297. See,
too, McDaniel v. Campbell, 78 Ga. 188.

⁴ Bell v. State, 80 Ga. 704.

⁵ Jemmerson v. State, 80 Ga. 111.

⁶ Firmeis v. State, 61 Wis. 140, 20
N. W. Rep. 663.

admitted by the accused, proof thereof will then be unnecessary.¹ A child is abandoned by its father when the latter leaves his family for a long time and does not supply them with anything to live upon, further than a nominal sum of money grossly inadequate for support.² And of course a statute making it a criminal offense for a husband to neglect to support his wife or children will authorize a conviction for a failure to support the children alone, though there be no averment of, or facts to establish, a neglect to support the wife.³ Upon principle it is clear that these statutes punishing the neglect of a parent of his duty in this respect do not relieve him in law of his civil liability to pay strangers or others who may furnish the abandoned child necessities after the parent himself has wrongfully, and in violation of his legal as well as moral duty, failed or refused to do so. The protection the law thus throws around a helpless child is favored, and will always be afforded when a proper case is made out.

§ 501. Duty of parent to support — Death of parent.— The duty of the parent to support and care for his child ends with life. While he lives he must provide necessities; but he is not bound to provide out of his estate for the care and maintenance of his child during minority. At common law the parent may bequeath all his property to strangers to the exclusion of his children, however worthy or needy of his beneficence.⁴ This rule of the common law, however, is changed in many states, where it is required by statute that the parent make at least some provision for his natural children and immediate lineal descendants. And even under the common law the courts were always ready to uphold a bequest in favor of a natural child rather than a stranger, whenever a question arose as to who would be entitled to take under the will. In other words, the doubt in all such cases would be resolved in favor of the child, as the presumption obtains that the parent would prefer his own child to a stranger.⁵

¹ *Firmeis v. State*, 61 Wis. 140, 20 N. W. Rep. 663.

² *Nugent v. Powell* (Wyo.), 33 Pac. Rep. 23.

³ *State v. Kerby*, 110 N. C. 558. It is also a misdemeanor in Ohio for a

parent to abandon his child. *Laws of Ohio*, 1890, p. 216.

⁴ 1 Bl. Comm. 449, 450.

⁵ 1 Bl. Comm. 450; *Fitch v. Weber*, 6 Hare (Eng. V. C.), 51; *Mangham v. Mason*, 1 V. & B. (Eng. Ch.) 410.

§ 502. Right of parent to charge for support.—As the law enjoins upon the parent the duty to support his infant child, the parent has no right to require the child to pay anything for the performance of this duty. Neither the parent in his life-time, nor his executors and legal representatives after him, have any right, in law, to claim anything from the child by reason of the support which the law requires to be given.¹ So, a stranger who undertakes to raise and keep a child without an express or strongly implied contract for pay, will have no right to recover for care, nurture and support given the child.² And a contract made by a child after arriving at maturity to pay his parent for supporting him during infancy is void for want of consideration to sustain it. The support the child has thus received is a natural right which he can require at the hands of his parent. The parent has no option to refuse to furnish it, and the discharge of his moral and legal duty does not afford him a basis of action.³ The same rule of right to compensation applies where the child has arrived at majority and still remains with his parents as before. In such a case the child is not liable for medicine, nursing, etc., in sickness nor other necessities.⁴ But where a child has become insane after attaining his majority and is cared for by the mother at the request of his guardian, his estate is properly chargeable with the necessities thus furnished him, it being clear that the guardian expected to pay and the mother to receive compensation.⁵

§ 503. Duty of parent to support children — Effect of decree of divorce.—The sundering of the marriage tie between the father and mother does not relieve the parent of his legal duty to support his children. While such a state of affairs necessarily ends the relation of husband and wife, it by no means puts an end to that of parent and child. Were this true the parent might connive at or procure a divorce for the very purpose, though concealed it might be, of evading the

¹ Newman v. Cooper, 48 La. Ann. 1206; Hatch v. Hatch, 60 Vt. 160.

² Young v. Heater, 63 Iowa, 668, 19 N. W. Rep. 827.

³ Perkins v. Westcoat, 3 Colo. App. 338.

⁴ Hatch v. Hatch, 60 Vt. 160.

⁵ Jessup v. Jessup (Ind. App.), 46 N. E. Rep. 550.

duty and liability fixed by law to support and care for his infant children. The dissolution of the marriage or the separation of the parties, whether by articles of separation or decree of a court of competent jurisdiction dissolving the relation, therefore does not change the liability of the father to support his child, and, it might be added, should not.¹ This rule holds good, too, though upon the decree of divorce the custody of the children is awarded to the mother.² And a wife who has been divorced from her husband by reason of his fault and who has been awarded the custody of the children may maintain an action against the divorced husband in any court having competent jurisdiction for necessities and support furnished such children by her.³ If the husband is not at fault in the matter of the divorce proceedings, the courts will rarely award the custody of the children to the wife, unless in cases where they are so young as to require the peculiar care for which the mother is by nature best fitted to bestow. If he be at fault, he is in no attitude to complain, for, had he acted as he should have done, he would not have been deprived of the custody of his children. His own unlawful conduct has deprived him of his children, and he certainly should not be permitted to shield himself by his misconduct from his liability to provide for those whom he has brought helpless into the world. That there are respectable authorities at variance with this contention must be admitted.⁴ But it is confidently believed that the better reasoning, as well as the pronounced weight of authority, is to the contrary. Where the mother culpably deserts her hus-

¹ Gilley v. Gilley, 79 Me. 292; Holt v. Holt, 42 Ark. 499; Brow v. Brightman, 136 Mass. 187; Bazeley v. Forder, L. R. 3 Q. B. 559.

² Courtwright v. Courtwright, 40 Mich. 633; Holt v. Holt, 42 Ark. 495; Stanton v. Wilson, 3 Day (Conn.), 37; Plaster v. Plaster, 47 Ill. 290; Brow v. Brightman, 136 Mass. 187; Bauman v. Bauman, 18 Ark. 321, 333; Goon v. Irvin, 1 Pin. (Wis.) 526; Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. Rep. 471; McMillen v. Lee, 78 Ill. 443; Harcourt v. Innis, 8 N. Y. S. 194; Gibson v. Gibson (Wash.), 51 Pac. Rep.

1041; State v. Phillips (Del.), 39 Atl. Rep. 453.

³ Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. Rep. 471; Gibson v. Gibson (Wash.), 51 Pac. Rep. 1041.

⁴ Finch v. Finch, 22 Conn. 411, two of the five judges in this case dissenting in an able and vigorous opinion. And the effect of this case was to overrule the earlier one of Stanton v. Wilson, 3 Day (Conn.), 37. See, too, Hancock v. Merrick, 10 Cush. (Mass.) 41. In this case the divorce was not absolute, but only *a mensa et thoro*, and the custody of the child was awarded to the mother.

band, taking with her the infant child of the marriage, the father will not be liable to her for anything she may expend for it towards its support and in providing necessities after he has procured a divorce from her on the ground of such desertion.¹ Nor would he be liable to the second husband of the wife for such necessities where the child had left the father at the request of the mother and gone to live with her and her new husband as a member of this family.² But though the mother wrongfully detains her infant child from the father, he is not thereby excused from his duty to support it, though he would not be then liable to the mother for anything she might expend in behalf of the child for necessities and support. The child cannot be deprived of the wholesome protection afforded it by the law because its mother may be guilty of a wrong either to the child itself or to the husband, whereby he is deprived of the comfort, pleasure and society of the child. If the children are improperly detained from the father by either the mother or a stranger, he has his remedy and may restore the custody of the infant to himself by *habeas corpus* or other proper proceeding. He cannot evade his duty to his offspring either because his wife unlawfully detains it from him or because he fails or neglects to avail himself of the remedy for the restoration of the custody of the child to him. To allow him to do so would be little short of an outrage.³

§ 504. Liability of father for support of child when improperly living with the mother apart from the father.—The duty of the father to support his child is not easily evaded, yet there are cases where the law relieves him from this obligation. If, for instance, the child, being at the age of discretion, wrongfully and without fault of the father lives with the mother, who is living apart from the father, the mother cannot recover from the father for the necessities and supplies furnished the infant thus living with her. Nor will a third person have any better right if the facts are known to him, or if he is put upon inquiry such as would naturally lead to an ascertainment of the facts.⁴ Before a stranger can recover for

¹ *Filter v. Filter*, 33 Pa. St. 50.

³ *State v. Sutcliffe*, 18 R. I. 53.

² *Foss v. Hartwell* (Mass.), 46 N. E. Rep. 411.

⁴ *Corry v. Lackey*, 105 Mich. 363, 63 N. W. Rep. 418; *Hyde v. Leisenring*

necessaries furnished a child under such circumstances, he must affirmatively show that the child was properly living separate from the father, whether with the mother or a stranger.¹ If the father and mother separate by mutual agreement and he permits the mother to take the children with her, he will be liable for their support, for in such a case there would be no fault of the mother shifting the duty of support to her.² And a child who is sent away from home to school by his parents is entitled to the same necessities he would be entitled to if at home; and, if the parent neglects to furnish his child thus situated such necessities, the infant may buy the same from a stranger, who will have a right of action against the parent for the same.³

§ 505. Liability of parent for support — Child may forfeit right to support.— The duty of a parent to support his infant child lasts only so long as the child is obedient to all the reasonable requirements of the parent. It is the duty of the child to live with and serve the parents within the bounds of reason and propriety. So, if the child, being of sufficient age to be chargeable with his misconduct, repudiates the authority of the father, deserts and refuses to live with him, or to work for him and discharge his duties to his parent in manner required by law of a child, the law at once divests him of the authority to buy supplies and necessities, or rather withholds this authority from him. The child may not emancipate himself, as it were, by his own wrong and at the same time claim all the privileges and rights of a dutiful infant.⁴ This rule rests upon necessity; for, were it not thus, a child would be encouraged in resisting parental control, and the parent would be deprived of the authority the law gives him over his child in order to best make him a useful and worthy citizen, a consummation

(Mich.), 65 N. W. Rep. 536; *Husband v. Husband*, 67 Ind. 583; *Hancock v. Merrick*, 10 Cush. (Mass.) 41; *Baldwin v. Foster*, 138 Mass. 449; *Beazley v. Forder*, L. R. 3 Q. B. 559; *Wallace v. Ellis*, 42 Ind. 582; *Johnson v. Onsted*, 74 Mich. 437.

¹ *Hyde v. Leisenring* (Mich.), 65 N. W. Rep. 536.

² *McMillen v. Lee*, 78 Ill. 443.

³ *Parker v. Tillinghast*, 19 Abb. N. C. 190.

⁴ *Gilley v. Gilley*, 79 Me. 292; *Weeks v. Merrow*, 40 Me. 151; *Angel v. McClellan*, 16 Mass. 27; *Hyde v. Leisenring* (Mich.), 65 N. W. Rep. 536; *Reynolds v. Loyl*, 10 Barb. 483; *Hunt v. Thompson*, 3 Scam. (Ill.) 179.

that cannot ordinarily be hoped for as a result of an unbridled license in favor of the child.¹ The duties of parent and child are reciprocal. They rest, in fact, upon each other. Without the one the other could not stand, as the duty in both instances must exist in order that it exist in either.

§ 506. Duty of child to support parent.— While the law always requires the parent to care for his child through the period of infancy, there is no corresponding duty resting upon the child to support the parent through any period of life, no matter how old, decrepit, infirm or helpless the parent may be.² All must agree, however, that there is certainly a sacred moral duty of the child to lend reasonable aid to his aged and helpless parent; and so sensibly has this moral duty impressed itself, that in some of the states there are statutory provisions requiring the child, in certain cases, and to a prescribed extent, to support his parent after he becomes old and infirm from the weight of years.³ If the child after becoming *sui juris* supports his parent of his own accord, as any other member of his family, there can be no recovery under the common law for such support, in the absence of an agreement, either express or strongly implied from the facts and circumstances, that the child would be paid.⁴ Upon a like principle it is held that a niece cannot, in the absence of a contract, recover from her uncle for services rendered him by her while living in his family and receiving support from him.⁵ But a stranger or an adult child who cares for the aged and infirm at a necessary outlay, as well as loss of time from his own business engagements, may recover a reasonable compensation where there is a mutual agreement, express or implied, or an expectation that payment will be made on the one hand, and received on the other. And such extraordinary services and assistance are amply sufficient as a consideration upon which to base an agreement

¹ White v. Henry, 24 Me. 531, 533; 285; Raymond v. Loyl, 10 Barb. 483; Gilley v. Gilley, 79 Me. 292. How. St. Mich., § 1741; Howe v.

² Rex v. Munden, 1 Str. 190; Edwards v. Davis, 16 Johns. 281, 285; 1 Bl. Comm. 453, 454; Ulrich v. Ulrich, 136 N. Y. 120, 32 N. E. Rep. 606; Dawson v. Dawson, 12 Iowa, 512.

³ Edwards v. Davis, 16 Johns. 281, 285; Raymond v. Loyl, 10 Barb. 483; How. St. Mich., § 1741; Howe v. Hyde, 88 Mich. 91.

⁴ Traver v. Shiner, 65 Iowa, 57, 21 N. W. Rep. 159; In re Snelly's Estate, 18 Misc. Rep. 719.

⁵ Young's Appeal (Mich.), 26 N. W. Rep. 643.

to pay for the same.¹ In other words, there is no moral duty, generally speaking, resting upon a child to neglect himself and family to minister to the wants of his parents, especially unless this can be done without serious injury to those of his immediate household, where the child has married and acquired a family of his own, with its incident responsibilities and duties. Cases of this nature, where it is sought to fasten or evade a liability, will usually depend largely upon the facts and circumstances in each instance, and often the question of liability must, in the nature of things, resolve itself into one of fact.

§ 507. Duty of parent to support—How enforced.—Neither an infant nor a third person has any remedy at law or in equity to force a parent to perform the duty of properly furnishing his minor child with the necessities of life. The law only fixes a liability to third persons who may volunteer to furnish the necessities for the infant child which the parent improperly neglects or refuses to supply; and authorizes the infant himself to buy the same when necessary, whereby a liability, in either case, is fixed upon the parent for the value of the necessities furnished. But further than this the law does not go. If the parent refuses to furnish the necessities, and the infant cannot get them anywhere upon the credit of the parent, there is no remedy. At least the courts are powerless to compel the parent to do his duty thus enjoined by law, except they will hold him and his estate liable for the necessities to any person who properly furnishes them.²

§ 508. Support—Inability of parent—Remedy.—Where the parent is unable to support his child there is nothing that can be done towards relief of the child, unless it be, perhaps, to place him in some public or charitable institution maintained for the rearing and education of poor children. Even then a court will not always take them from the care and oversight of the parent and thus sever the family relation and deprive each of the comfort and society of the other. The love of the parent for his child is deemed one of the strongest safeguards

¹ *Kelsey v. Kelly*, 63 Vt. 41; *McFeaters v. Pattison* (Pa.), 41 Atl. Rep. 608. ² *Huke v. Huke*, 44 Mo. App. 308; *In re Ryder*, 11 Paige, 185.

of the child's welfare, and the law is always reluctant to interfere with parental authority for this and other reasons. In all cases of this kind, where the child has an estate from a source other than the parents, courts having jurisdiction in such matters will order an allowance out of such estate to educate and fit the child for the battle with the world which certainly awaits him in later life.¹ This allowance is made for the manifest good of the child as well as indirectly for the incidental good to the state which will follow the proper training and education of her citizens.

§ 509. Duty of parent to support — Poverty.—The principle of law which requires a parent to support his child and properly care for him is an unbending one. That the parent is rich or poor by no means changes it in the least. The liability rests upon public policy. It may be that a poor parent cannot do as much for his child as his more favored neighbor, and a rich parent may be able to do more than the law requires of any parent for his child; but the poor parent must provide to the extent of his ability for his child, and he will never be heard to plead his poverty in bar of his liability arising from a failure to perform this requirement of the law.² A contrary rule would have a tendency to encourage thriftlessness on the part of the parent. But in any event, no matter how poor the parent, he is at least liable in law for supplies furnished or bought by his child when he fails to furnish the same, and the creditor at least has a right to judgment for the same, whether he can enforce it or not.

§ 510. Support of grandchildren.—There is no common-law duty fixed upon a parent to support his grandchild. His duties in this respect cease with his first and immediate lineal descendants. It does not continue "from generation to generation."³ If, however, the duty is enjoined by statute, it may, of course, be enforced, for then it becomes the positive law; but such statutes will not burden a parent with the duty of

¹ *Billingsley v. Critchet*, 1 Brown, 403; *Ex parte Petre*, 7 Ves. 403. *ler v. Fuller*, 23 Fla. 236; *Wellesley v. Beaufort*, 2 Russ. (Eng. Ch.) 328.

² *In re Kane*, 2 Barb. Ch. 375; *Debford v. Bedford*, 32 Ill. App. 455; *Ful-* ³ *Hillsboro v. Deering*, 4 N. H. 86, 93.

supporting his illegitimate grandchild, and such a child will not be deemed to be within the meaning of the word "child" unless so expressed in the statute itself.¹

§ 511. Advancement — Definition of the term.—An advancement is in the nature of a gift from a parent to his child of property of any kind as a satisfaction or settlement, in whole or in part, as the case may be, of the right of the child to share in the estate of his parent, made in the life-time of the latter, under and by virtue of the laws of descent. It is an allotting of a portion of the estate to the child, and it precludes the child from participating in the distribution of the estate of his parent to the extent that the advancement is the whole or only a part of the proper share of the child to whom the advancement has been made.² While an advancement is usually made and takes effect in the life-time of the parent, this is not always the case. It must receive its vitality and legal force while the parent is alive; but the terms and conditions of the advancement may postpone the right of enjoyment in the child until a time in the future, as, for instance, until the death of the parent.³ When the parent once makes the advancement he loses all control over the thing advanced, be it property of whatsoever kind. The act is irrevocable, and the parent cannot change the status of property which he gives as an advancement after the act effecting the advancement is once complete.⁴ And the fact that a parent gives more to a child by way of advancement than his distributive share would amount to does not raise any presumption that undue influence was brought to bear on the parent by the child thus favored.⁵

§ 512. Advancement — General rule.—Where a parent gives or delivers to his child, whether at the time an infant or not, money or property of any kind, or pays a debt for the child

¹ Hillsboro v. Deering, 4 N. H. 86, 93. 69 Iowa, 115, 28 N. W. Rep. 470; Clark

² Johnson v. Patterson, 13 Lea v. Wilson, 27 Md. 693.
(Tenn.), 626; Yundt's Appeal, 13 Pa. ³ Clark v. Wilson, 27 Md. 693.
St. 575; Osgood v. Breed, 17 Mass. 355, ⁴ Hengst's Appeal, 6 Watts (Pa.),
358; In re Hengst's Estate, 6 Watts 86. And see Cohen v. Parish (Ga.),
(Pa.), 86; Meadows v. Meadows, 11 31 S. E. Rep. 205.
Ired. (N. C. Law), 148; High's Appeal, ⁵ Towson v. Moore (U. S.), 19 Sup.
21 Pa. St. 283; McMahon v. McMahon, Ct. Rep. 332.

with no agreement as to, nor intention of demanding, repayment, either express or clearly implied, or of requiring a return of the property on the one hand, or an intention of the child to return it on the other, such transaction will be deemed in law an advancement from the parent to the child.¹ Where, therefore, it is contended that a voluntary conveyance from a parent to a child is not meant or considered as an advancement, the burden of proof is on the party so alleging to make an affirmative showing accordingly.² Therefore a gift from a parent to a child will not be held an advancement where it is clearly proven that it was not intended by the parent as an advancement. And when this appears, the child thus favored will take of the estate of his ancestor the same as though there had been no gift.³ The distinction between a gift and an advancement is, that, in the case of an advancement, the child can only receive his proportional share of the estate of his parent less the advancement; while in the case of the gift, this is made to the child without any intention of charging his distributive share of the estate, and is never held to deprive him of inheriting just as he would have done had there been no gift or transfer of property to him of any kind whatever. By

¹ *Burton v. Baldwin*, 61 Iowa, 286, 16 N. W. Rep. 110; *McMahill v. McMahonill*, 69 Iowa, 115, 28 N. W. Rep. 470; *Johnson v. Ghost*, 11 Neb. 414, 8 N. W. Rep. 209; *Henry v. Harbison*, 23 Ark. 25; *Phillips v. Phillips*, 90 Iowa, 541, 58 N. W. Rep. 879; *Morris v. Morris*, 9 Heisk. (Tenn.) 814; *Hicks v. Keats*, 4 Barn. & Cr. 71; *Brown v. Burke*, 22 Ga. 574; *Phillips v. Chappell*, 16 Ga. 16; *Parks v. Parks*, 19 Md. 823; *Sampson v. Sampson*, 4 S. & R. (Pa.) 329; *Holliday v. Wingfield*, 59 Ga. 206; *Burns v. Henry*, 140 Ind. 455, 39 N. E. Rep. 256; *Howard v. Howard* (Ga.), 28 S. E. Rep. 648; *Ruch v. Biery*, 110 Ind. 448, 11 N. E. Rep. 812; *Higman v. Vansdale*, 135 Ind. 76, 25 N. E. Rep. 140; *Scott v. Harris*, 127 Ind. 522, 27 N. E. Rep. 150; *Heady v. Brown* (Ind.), 49 N. E. Rep. 805; *Murphy v. Murphy*, 95 Iowa, 271, 63 N. W.

Rep. 697; *White v. White*, 52 Ark. 188, 12 S. W. Rep. 201.

² *Scott v. Harris*, 127 Ind. 522, 27 N. E. Rep. 150; *Murphy v. Murphy*, 95 Iowa, 271, 63 N. W. Rep. 697; *Culp v. Wilson*, 133 Ind. 294, 32 N. E. Rep. 928; *Phillips v. Phillips*, 90 Iowa, 541, 58 N. W. Rep. 879; *Burton v. Baldwin*, 61 Iowa, 286, 16 N. W. Rep. 110; *Tremper v. Barton*, 18 Ohio, 418; *Weaver's Appeal*, 63 Pa. St. 309; *Ray v. Loper*, 65 Mo. 470; *Cecil v. Beaver*, 28 Iowa, 242; *McCan v. Burk*, 31 Ind. 516; *Holliday v. Wingfield*, 59 Ga. 206; *Morris v. Morris*, 9 Heisk. (Tenn.) 814; *McMahill v. McMahonill*, 69 Iowa, 115, 28 N. W. Rep. 470; *Finch v. Garrett* (Iowa), 71 N. W. Rep. 429; *Watkins v. Young*, 31 Gratt. (Va.) 84; *Clark v. Wilson*, 27 Md. 693; *Gilbert v. Witherell*, 2 Sim. & Stu. 254.

³ *Le Coulteux de Caumont v. Morgan* (N. Y.), 9 N. E. Rep. 861.

statute in Illinois, "no gift or grant shall be deemed to have been made as in advancement unless so expressed in writing, or charged in writing by the intestate as an advancement, or acknowledged in writing by the child or other descendant."¹

Where a child occupies and claims land given him by his parent as an advancement, he will acquire title by prescription at the end of the statutory period, though the gift be by parol.²

§ 513. Advancement — Presumption — Rebuttal.— While the presumption of an advancement is always very strong when a parent transfers to his child any property where there is no evidence of a gift and no apparent intention to make any charge or receive any pay, yet this is a presumption of law of the existence of a fact which, until overcome by proof, is always sufficient to establish the advancement; yet the presumption itself may be overturned by clear proof that there was an intention or understanding that the parent should be paid for the property, or other like facts which would show an intention not to treat the transaction as an advancement.³ It may be shown that it was the intention of the parent to impress the property with a trust in his own favor or in favor of another, though it is necessary that the proof to this effect be clear and convincing.⁴ The rebutting testimony may be by parol as well as otherwise, where it is made thereby to appear with sufficient clearness that the intention to impress a trust upon the property conveyed existed.⁵ In fact, circumstantial or any other legitimate evidence may be adduced to show the purpose and intent of the parent.⁶ Where a parent conveys property to his child by

¹ 1 Starr & C. St. Ill., ch. 39, subd. 7; Wallace v. Reddick, 119 Ill. 151, 8 N. E. Rep. 801.

² Lynn v. Cannada (Ky.), 49 S. W. Rep. 461.

³ Brown v. Burk, 22 Ga. 574; Hatch v. Straight, 3 Conn. 31; Watkins v. Young, 81 Gratt. (Va.) 84; Tussand v. Tussand, 9 Ch. Div. 363, 378; Milner v. Freeman, 40 Ark. 62; Robinson v. Robinson, 45 Ark. 481; Hall v. Hall, 107 Mo. 101, 17 S. W. Rep. 811; Hattersley v. Bissett, 51 N. J. Eq. 597, 29 Atl. Rep. 187; Fowkes v. Pascoe,

10 Ch. App. 343; Parish v. Rhodes, Wright (Ohio), 339; Jackson v. Matsdorf, 11 Johns. 91; Sampson v. Sampson, 4 S. & R. (Pa.) 329; Sims v. Sims, 10 N. J. Eq. 158; Speer v. Speer, 14 N. J. Eq. 240; Gunn v. Thurston, 130 Mo. 339, 32 S. W. Rep. 654; Phillipps v. Chappell, 16 Ga. 16. See also Cowan v. Tucker, 5 Ired. (N. C. Law), 78.

⁴ Bogy v. Roberts, 48 Ark. 17, 2 S. W. Rep. 186.

⁵ Milner v. Freeman, 40 Ark. 62; Robinson v. Robinson, 45 Ark. 481.

⁶ Milner v. Freeman, 40 Ark. 62.

deed, wherein it is positively stipulated and expressed in the instrument of conveyance that it is not made or intended as an advancement, it will be deemed a gift rather than an advancement; and this is true though in his will the parent declares that he wishes all his children to share equally in his estate.¹ The parent is not, of course, required to regard his transfers to his children as advancements. When, therefore, the presumption is overcome by an express declaration in the instrument effecting the transfer, the character of an advancement cannot be imputed to the transfer, and the fact that, when the parent is about to die, he expresses the wish in his will, which in no case can take effect until his death, that his children share his estate equally, this does not alter the case, for his estate cannot, when his will takes effect in such an instance, consist of any of the property thus conveyed effectively before his death. While parol evidence is always admitted in proper cases, if the rules of evidence would not thereby be violated, to establish an intention on the part of the parent not to regard the conveyance as an advancement, yet, in order to be admissible for this purpose, it must have reference to facts or declarations anterior to or contemporaneous with the transaction.²

§ 514. Advancement — Purchase of property by parent in name of child.—The general rule of law is, where a parent purchases property and, instead of taking title thereto in himself, takes it in the name of his child, or in the name of any or all of his children, or furnishes his child with money to purchase property without any agreement or intention of remuneration or repayment, the law will not impress the property with a trust, as would usually be the case in dealings of this kind between strangers; but, rather, it deems that it was intended by the parent to confer upon his child an advancement. The natural interest of the parent in the welfare and thrift of his children in accumulating property is thought sufficient to warrant this rule.³ And the same rule obtains when a parent pays

¹ *Aden v. Aden*, 16 Lea (Tenn.), 453. 872; *Bogy v. Roberts*, 48 Ark. 17, 2 S.

² *Hatch v. Straight*, 8 Conn. 31; *W. Rep.* 186; *Parish v. Rhodes*, *Wright Robinson v. Robinson*, 45 Ark. 481. (Ohio), 339; *Shiver v. Brock*, 2 Jones (N. C. Eq.), 137; *Brown v. Burke*, 22 Ga. 574; *Rider v. Kidder*, 10 Ves. 366, 575.

³ *Kern v. Howell* (Pa.), 36 Atl. Rep. 337; *Kemp v. Cossart*, 47 Ark. 62, 14

a debt of his child, taking no obligation or agreement of repayment from the child in any way.¹ The presumption of an advancement in all such instances is so strong that the fact that the parent may remain in possession of the property advanced, enjoying and using the rents and profits during the minority of the child, is not sufficient to overcome it.² Though the child pay to the parent a small sum, nominal in comparison to the real value, this will not serve to rebut the presumption of an advancement.³ But where a parent advances money or other property to his child, and takes from the child an obligation for its payment, whether any interest is exacted on the amount to be paid or not, this will ordinarily be sufficient to rebut the presumption of an advancement, as such an act is necessarily inconsistent with the idea of an advancement.⁴ But even in instances of this kind it is sometimes possible to show, in rebuttal of the presumption against an advancement which necessarily arises upon such a state of facts, that an advancement was really meant.⁵ Rarely, it would seem, however, could the idea of an advancement be sustained when it was the actual intention of the parties that remuneration should in good faith be made.⁶

§ 515. Advancement — Ownership of property advanced.

Where a parent conveys or transfers to his child property such as is not within the ordinary necessities of life incident to support and proper care, the presumption is that this is meant by the parent as an advancement, and that he intends to vest the

S. W. Rep. 465; *Catoe v. Catoe*, 32 S. C. 590, 10 S. E. Rep. 1078; *Highman v. Vanosdal*, 125 Ind. 74, 25 N. E. Rep. 140; *Hall v. Hall*, 107 Mo. 101, 17 S. W. Rep. 811; *Tremper v. Barton*, 18 Ohio. 418; *Ray v. Loper*, 65 Mo. 470; *Cecil v. Beaver*, 28 Iowa, 241; *Robinson v. Robinson*, 45 Ark. 481; *Milner v. Freeman*, 40 Ark. 62.

¹ *Steele v. Friarson*, 85 Tenn. 430, 8 S. W. Rep. 649; *Scott's Ex'rs v. Scott*, 83 Va. 251, 2 S. E. Rep. 431; *McDearman v. Hodnett*, 83 Va. 281, 2 S. E. Rep. 643; *Johnson v. Eaton*, 51 Kan. 708, 23 Pac. Rep. 597; *West v. Beck*, 59 Iowa, 520, 64 N. W. Rep. 599.

² *Bogy v. Roberts*, 48 Ark. 17, 2 S. W. Rep. 106; *White v. White*, 52 Ark. 188, 12 S. W. Rep. 201; *Eastham v. Powell*, 51 Ark. 530, 11 S. W. Rep. 823; *Kemp v. Cossart*, 47 Ark. 62, 14 S. W. Rep. 465; *Rhea v. Bagley*, 63 Ark. 374, 38 S. W. Rep. 1039.

³ *Hatch v. Straight*, 3 Conn. 81.

⁴ *West v. Bolton*, 23 Ga. 531; *High's Appeal*, 21 Pa. St. 283.

⁵ *West v. Bolton*, 23 Ga. 531.

⁶ See *Barton v. Rice*, 22 Pick. (Mass.) 508; *Stewart v. State*, 2 Harr. & G. (Md.) 114.

title thereto in the child, and this is the effect of such a transaction when *bona fide*. The title vests and becomes perfect in the child as effectively as though he were *sui juris*, and neither the parent nor others thereafter have any right to, nor property in, the thing transferred.¹ But if the parent sells the property thus given the child, and in lieu of the same gives the child its equivalent in money, and the child retains the money thus received, he cannot assert any estate in the land, provided he has arrived at maturity when he makes the election, for his purpose to accept the value of the land is not consistent with an intention to hold the property which the money represents. He cannot hold two inconsistent positions.² Generally, where a parent is indebted to his child, and an advancement equal to or greater than the indebtedness is made the child, the transaction will be deemed in law to be in satisfaction of the debt, and the child will not be required to deduct the amount thus received from his distributive share of the estate of his parent.³ Mere presents of small value given the child by the parent, or the customary support and maintenance required of the parent by law, are never considered advancements.⁴ Advancements are often made to a child when he attains his majority and starts out in life upon his own responsibility. This is often the case when he marries. The law readily regards transfers of property made to a child at this time as advancements.⁵ The natural presumption in all such cases is, the parent wishes to assist his child, who has arrived

¹ Weaver's Appeal, 63 Pa. St. 309; E. Rep. 482; Spires' Adm'r v. Langford (Ky.), 25 S. W. Rep. 597, 29 Atl. Rep. 187; Gordon v. Barklew, 6 N. J. Eq. 94; Den v. McPeake, 2 N. J. Law, 211; Dutch's Appeal, 57 Pa. St. 461.
² West v. Jones, 85 Va. 616, 8 S. E. Rep. 468.
³ Brooks v. Summers (Ky.), 38 S. W. Rep. 1047.
⁴ Meadows v. Meadows, 11 Ired. (N. C. Law), 148; Ison v. Ison, 5 Rich. (S. C. Eq.) 15.
⁵ Meadows v. Meadows, 11 Ired. (N. C. Law), 148; Hinton v. Hinton, 1 Dev. & Bat. (N. C. Eq.) 587; Adams v. Hayes, 2 Ired. (N. C. Law), 361.

Chinn v. Murray, 4 Gratt. (Va.) 384; McClannahan v. McClannahan, 36 W. Va. 34, 14 S. E. Rep. 419; Grangiac v. Arden, 10 Johns. 293; Hillebrant v. Brewer, 6 Tex. 45; Steele v. Friars, 85 Tenn. 430, 3 S. W. Rep. 649; Wheeler v. St. Joseph & W. R. R. Co., 31 Kan. 640, 3 Pac. Rep. 297; Smith v. Brown, 66 Tex. 543, 1 S. W. Rep. 373; Cazassa v. Cazassa, 92 Tenn. 573, 22 S. W. Rep. 560; Holliday v. Wingfield, 59 Ga. 206; Hatch v. Straight, 3 Conn. 31; Clark v. Warner, 6 Conn. 355; Aden v. Aden, 16 Lea (Tenn.), 453; Mason v. Holman, 10 Lea (Tenn.), 315; Roberts v. Coleman, 37 W. Va. 143, 16 S.

at majority, to get a start in life, as this is the proper thing for a parent to do when his resources will permit. If such advancement should be equal to the share of the child in the estate of the parent, he will be entitled to nothing as distributee. If less than his portion, he will be entitled to his full part, less the advancement.¹ Should the thing or property advance, the child die or cease to exist from any cause, the child will nevertheless be charged with the advancement.²

§ 516. Advancement — What necessary to constitute.— In order to effect a valid advancement to a child, the parent must so intend the transaction at the time he parts with the title to the property. He cannot make a gift of property and afterwards conclude to impress the property given with the character of an advancement.³ Perhaps the only way he could deprive the child of any further right to share as a distributee in his estate in a case of this kind would be to make advancements or gifts of his property to his other children, sell it absolutely, or bequeath or dispose of it in some similar way. If the advancement be made upon a contingency, it will operate as such with effect upon the happening of the contingency; otherwise it will not amount to an advancement.⁴ But it has been held that the parent, with the consent of the child, may convert an advancement into a gift;⁵ and when so changed into a gift, it cannot be again made an advancement by the parent without the consent of the child.⁶ Again, there must be privity and mutuality of dealing. Mere conversations or declarations of a parent that he intends to make an advancement to a child are not sufficient to establish the advancement, especially one which could be specifically enforced by the child.⁷ When a parent transfers to a child money or other property, and the child agrees to pay the parent interest on the value of same

¹ Bemis v. Stearns, 16 Mass. 200,

Eq.), 90, 103; Weatherhead v. Field,

² McKelvy v. Burrow, 89 Tenn. 101, 17 S. W. Rep. 1035. See, too, Berthelot v. Fitch, 44 La. Ann. 503, 10 S. Rep. 867; Cawthon v. Kimbell, 46 La. Ann. 750, 15 S. Rep. 101.

26 Vt. 665; Johnson v. Belden, 20 Conn. 322.

³ Lawson's Appeal, 23 Pa. St. 85; Osgood v. Breed, 17 Mass. 356. And see M'Caw v. Blewit, 2 McCord (S. C.

⁴ Edwards v. Freeman, 2 P. Wms. 435, 442.

⁵ Sherwood v. Smith, 23 Conn. 516.

⁶ Sherwood v. Smith, 23 Conn. 516.

⁷ Bannister's Ex'rs v. Shore, 1 Wash. (Va.) 219.

during the life of the latter, this will be deemed an advancement; and the property thus given, though interest in the nature of an annuity or otherwise is required to be paid to the parent, will belong to the child when the death of the parent takes place.¹ Again, in order that an advancement be effective, the parent must, in his life-time, divest himself of all right to and control over the thing or property advanced. If there remains any material act or thing to be done on his part, the advancement can never amount to a vested right or estate. There must be an intention on the part of the parent coupled with all acts necessary to consummate the purpose in his life-time.²

§ 517. Advancement — Miscellaneous features.— Unless a child wishes to bring his advancement into hotchpot, it will operate to extinguish his right to inherit according to the share he has received by the advancement.³ The title by virtue of the advancement becomes perfect in the child at the time the parent determines to release unto and vest in the child the property intended as an advancement. If delivery of possession, therefore, be made by the parent, but the deed or transfer is not made or agreed upon until a later time, the date of the taking effect of the transfer will be when the transaction is actually determined upon and completed. And when the gift, as an advancement, is made subsequent to the delivery of the property transferred, it does not relate back to the time of the delivery in the first instance.⁴ The benefit of an advancement is not lost by the sale of the property. By the advancement the title and right thereto become fixed and vested in the child, and his relation to his parent in receiving the property is by no means inconsistent with a right of disposal in the child.⁵ Of course, where it is intended to make an advancement of real property, it is necessary that the transfer be made in accordance with the forms and requirements of law

¹ In re Miller's Will, 73 Iowa, 118, 34 N. W. Rep. 769; Ruch v. Biery, 110 Ind. 448, 11 N. E. Rep. 312.

² Smith v. Smith, 5 Ves. 721; Crosby v. Covington, 24 Miss. 619; Joyce v. Hamilton, 111 Ind. 163, 12 N. E. Rep. 294. And see, too, Herkimer v. McGregor, 126 Ind. 247, 25 N. E. Rep. 145.

³ Den v. McGinnis, 2 N. J. Law, 211.

⁴ Shiver v. Brock, 2 Jones (N. C. Eq.), 137; Stallings v. Stallings, 1 Dev. (N. C. Eq.) 298.

⁵ Meadows v. Meadows, 11 Ired. (N. C. Law), 148.

for the conveyance of real estate. A parol gift unaccompanied by possession or such part performance as would take the transaction out of the statute of frauds would be inoperative.¹ An advancement may consist of property of any kind. It may consist of the rents and profits arising from the use of land for a time, an annuity, or any other form or species of property.² An advancement is exclusive of any right of the widow by virtue of her dower or other similar estate to the extent that the husband can convey his realty free from such rights of the wife.³ Of course, a husband could not cut off the right of his wife to dower or homestead, ordinarily, unless she should join with him in the instrument transferring the land as an advancement, and sign, seal and acknowledge the same in due form of law. When the wife has thus released her inchoate title or estate in the lands of her husband to the child, he may bring these lands into hotchpot and the wife will have no claim of dower or otherwise as against such lands. Property brought into hotchpot is for the exclusive benefit of the heirs, and they take equally in the whole estate where the estate of the wife has been relinquished as required.⁴

§ 518. Advancement — What is not.— The law of advancements does not by any means preclude business dealings between parent and child. The parent may confide to the care of the child property of any kind for any legitimate purpose, either as bailee, trustee or otherwise, and the child will be bound to account to the parent for any dereliction of duty towards the property or the trust reposed in him just as would a stranger, unless the intention of parent be that the child have the property as an advancement instead of holding under his directions and subject to his orders.⁵ So, a parent may lend his child money with the intent that it be paid back; and the child will be bound to make payment to the parent, whether the agreement to repay be in the form of a note or otherwise.⁶ Where the parent pays a fine to release a son-in-law from prison,

¹ *Meadows v. Meadows*, 11 Ired. (N. C. Law), 148.

² *Edwards v. Freeman*, 2 P. Wms. 435.

³ *Knight v. Oliver*, 12 Gratt. (Va.) 33.

⁴ *Jackson v. Jackson*, 28 Miss. 674.

⁵ *Ruiz v. Campbell*, 6 Tex. Civ. App. 714, 26 S. W. Rep. 295.

⁶ *Ruiz v. Campbell*, 6 Tex. Civ. App.

714, 26 S. W. Rep. 295.

this cannot be deemed an advancement to the daughter, unless it be made to appear that it was clearly the intention of the parent in thus releasing the husband of his daughter to charge her with the amount as an advancement.¹ A conveyance from a parent to a child for the actual and express consideration of necessities of various kinds furnished the parent by the child will not be held an advancement, though the amount of the consideration was less than the value of the property conveyed.² If a parent expends money upon property which would descend by operation of law to his oldest child in order to keep it repaired and protected from waste or deterioration, this will not be an advancement to such oldest child of the funds thus spent, and he cannot be charged therewith in allotting him his distributive share of the estate.³

§ 519. Advancement—Acceptance—Presumption.—Where a parent makes an advancement to a child, the presumption of an acceptance is readily indulged where the transaction is evidently for the benefit of the latter. It makes no difference that the child be so young as not to be able to appreciate the object, nature or effect of the advancement, or that by reason of his infancy he is incapable of binding himself by contract.⁴ And where the child is thus of very tender years, there is generally no necessity of making delivery of title deeds or other evidence of ownership; but such a delivery to the parent, guardian or trustee for the child will suffice.⁵

§ 520. Advancement — Repudiation — Hotchpot.—If a child who has received an advancement from the estate of his parent prefers to take as an heir rather than retain the advancement and receive his distributive share, less the advancement, he may do so under the common law. Of course he cannot keep the advancement and insist upon an equal interest in the estate with the other heirs, for this would thwart the purpose of the parent in making the advancement, on the one

¹ *Boothe v. Foster*, 111 Ala. 312, 20 S. Rep. 356.

² *Kiger v. Terry*, 119 N. C. 456, 26 S. E. Rep. 36. And see *In re Strickler's Estate*, 182 Pa. St. 253, 37 Atl. Rep. 999.

³ *Smith v. Smith*, 5 Ves. 721.

⁴ *Davis v. Garrett*, 91 Tenn. 147, 18 S. W. Rep. 113. And see *Redd v. State* (Ark.), 47 S. W. Rep. 119.

⁵ *Davis v. Garrett*, 91 Tenn. 147, 18 S. W. Rep. 113.

hand, and operate to the great injury and injustice of the other children, on the other.¹ The bringing of the advancement into hotchpot, however, is optional with the child who has received it. He cannot be compelled either by the other children, other heirs or by third persons to do so.² And an allowance of property which may be brought into hotchpot, to the end that the child so bringing it in may be permitted under the law to take equally with other heirs, must be a provision made by the parent in his life-time, and not an interest conferred by will.³ But it is not necessary that the child bring back into the estate the interest or increase of the property received as an advancement, but only the property itself.⁴ And it is not really necessary that the very same property given be produced in specie or kind; but property of equal value to that given at the time of the advancement will entitle the child to an equal distributive share in the estate.⁵ A father cannot, by merely charging his child with an advancement, where no real transfer of any property is made, preclude the child from receiving an equal distributive share of his property.⁶ When an advancement consists of lands or other property, its value at the time the child is placed in the control and enjoyment thereof, and when the parent thus surrenders all his property rights, is the value to be considered in arriving at a correct distributive share to which the child receiving the advancement would be entitled, not the value it may have at the time of the distribution.⁷ And it seems that the child to whom the advancement is made may elect to take as a distributee after

¹ Grattan v. Grattan, 18 Ill. 167; Ray v. Loper, 65 Mo. 470, 472; Oyster Elliott v. Wilson, 98 Mo. 379, 11 S. W. v. Oyster, 1 S. & R. (Pa.) 422.

Rep. 739; Morris v. Morris, 9 Heisk. (Tenn.) 814; 2 Bl. Comm. 190, 191; Hudson v. Hudson's Ex'rs, 3 Rand. (Va.) 117; Phillips v. McLaughlin, 26 Miss. 592.

² Phillips v. McLaughlin, 26 Miss. 592.

³ Edwards v. Freeman, 2 P. Wms. 435, 440.

⁴ Hall v. Davis, 3 Pick. (Mass.) 450; Ison v. Ison, 5 Rich. (S. C. Eq.) 15; Nelson v. Wyan, 21 Mo. 347.

⁵ Grattan v. Grattan, 18 Ill. 167, 170; Nelson v. Wyan, 21 Mo. 347, 352;

⁶ Sherwood v. Smith, 23 Conn. 516.

⁷ Oyster v. Oyster, 1 S. & R. (Pa.) 422; Burton v. Dickson, 3 Yerg. (Tenn.) 112; Warfield v. Warfield, 5 Harr. & J. (Md.) 459; Hudson v. Hudson's Ex'rs, 3 Rand. (Va.) 117; Jackson v. Jackson, 28 Miss. 674; Kyle v. Conrad, 25 W. Va. 760; McClannahan v. McClannahan, 36 W. Va. 34, 14 S. E. Rep. 419; McKelvy v. Burrow, 89 Tenn. 101, 17 S. W. Rep. 1035; Clark v. Wilson, 27 Md. 693; Barber v. Taylor, 9 Dana (Ky.), 84.

a bill filed for partition of that part of the ancestor's property not advanced to any child by the other distributees.¹ If the advancement by the parent be meant to be in full of the entire distributive share of the child, the latter will not be entitled to any further rights in or out of the estate of the parent if he refuses to bring his advancement into hotchpot or elects not to do so.² If the advancement be only in part of the child's interest in the estate, he may, in person, if he be *sui juris*, or by guardian with the sanction of the proper court, if he be an infant, elect to bring his advancement into hotchpot and take an equal distributive share of the estate.³ If the child should apply to the proper court for a distributive share of the estate of his deceased parent, this will be, in effect, an election to bring his advancement into hotchpot, to the end that he may have the distributive share asked for, and he will be compelled to bring in the advancement before any equal distributive interest will be decreed him.⁴ The widow, at common law, could not take property by advancement. This being true, there was nothing for her to receive out of the aggregate property. It was only the distributive shares of the children of the intestate which could be affected by the advancement. The wife could not bring an advancement into hotchpot, for she did not inherit as a child.⁵

§ 521. **Advancement—Proof of.**—An advancement may be shown to be such by any competent evidence of the intention of the parent to so regard the transaction. All the surroundings and circumstances of the particular case may be taken into consideration in arriving at a conclusion. Proof of the intention of the advancement may be made by showing book entries of the parent contemporaneously with the act;⁶ or the same fact may be shown by the parol declarations of the parent at the time of making the advancement.⁷ But the

¹ Warfield v. Warfield, 5 Harr. & J. McClannahan v. McClannahan, 36 (Md.) 459. W. Va. 34, 14 S. E. Rep. 419. And see

² Taylor v. Reese, 4 Ala. (N. S.) 121. Joyce v. Hamilton, 111 Ind. 163, 12 N. E. Rep. 294.

³ Andrews v. Hall, 15 Ala. 85.

⁴ Phillips v. McLaughlin, 26 Miss. 592.

⁵ Jackson v. Jackson, 28 Miss. 674.

⁶ Nelson v. Nelson, 90 Mo. 460, 2 S. W. Rep. 413; 1 Greenl. Ev., § 118; Powell, 51 Ark. 530, 11 S. W. Rep. 823.

⁷ Merkel's Appeal, 89 Pa. St. 840; Nelson v. Nelson, 90 Mo. 460, 2 S. W. Rep. 413; Frey v. Heydt, 116 Pa. St. 601, 11 Atl. Rep. 535; Eastham v.

mere verbal declarations of the parent that he had made a claimed or disputed advancement are not admissible as evidence of the advancement if made merely to strangers.¹ There must be an intent on the part of the parent at the time of the transaction to constitute an advancement, and the evidence to support this must be of some fact which would tend to establish this intent at the time of the transaction, not before nor afterwards.² Usually when a parent makes a deed conveying land either to his child directly, or to a trustee for his use and benefit, no consideration actually passing between the parent and child, and no money or promise of payment of any kind being exacted or contemplated by the parent, the property thus transferred will be deemed an advancement when it was so intended at the time of the transaction, and the intention may be shown by parol testimony, though the deed recite the payment of a money consideration as a ground and basis of the transfer, which consideration so expressed is the full value of the property named in the deed.³ The recital in the deed is nothing more than a receipt for the recited purchase-money or other consideration, and this part of a deed may always be contradicted or explained by parol, just as may a receipt for any other purpose. This is one of the familiar exceptions to the general rule of evidence that oral proof is incompetent to vary, alter, add to or modify a written instrument unambiguous upon its face.

§ 522. Advancement — Gift to trustee.—Where a parent gives property to a trustee for his child, whether it be to the husband or wife of the latter, or to a stranger for his or her use and benefit, the transfer will be regarded as an advancement; and the child thus favored can share in the distribution of the estate of the parent only as might have been done had the advancement been made direct instead of to a stranger for the

¹ Ray v. Loper, 65 Mo. 470; Nelson v. Nelson, 90 Mo. 460, 2 S. W. Rep. 413; Merkel's Appeal, 89 Pa. St. 340. Rep. 482; Weaver's Appeal, 63 Pa. St. 309; Holliday v. Wingfield, 59 Ga. 206.

² Frey v. Heydt, 116 Pa. St. 601, 11 Atl. Rep. 535; Lawson's Appeal, 23 Pa. St. 85; Cazassa v. Cazassa, 92 Tenn. 573, 22 S. W. Rep. 560; Roberts v. Coleman, 37 W. Va. 143, 16 S. E. Rep. 692; Bruce v. Slemp, 82 Va. 352, 4 S. E. Rep. 692; Sadler v. Huffhines (Ky.), 12 S. W. Rep. 715; Hattersley v. Bissett, 50 N. J. Eq. 577, 25 Atl. Rep. 332; Phillips v. Chappell, 16 Ga. 16.

benefit and use of the child.¹ In other words, advancements made directly to a third person for the benefit of a child have the same effect in law on his rights as though the transfer had been made directly to the beneficiary in the first instance.²

§ 523. Advancement — Acceptance by child of an advancement in lieu of a distributive share in the estate of the parent — Effect.— A parent may give his child certain property in lieu of a right to participate in the distribution of the estate of the parent. If the child be of full age and the property advanced be a reasonable allowance, and there is no imposition upon the child by the parent, an acceptance of such an allowance in lieu of any further interest in the estate of his ancestor is binding upon him and forever precludes him from asserting any rights as a distributee.³ And where a child receives an advancement from the parent in lieu of any further right to participate in distribution, the rights of the other children to share in the parental estate will be the same whether the child to whom the parent makes the advancement with such understanding dies before the parent does or not.⁴ And of course it makes no difference whether the property advanced be real or personal estate. Money or other property accepted by a child as an advancement and in lieu of participation in the parental estate is just as binding on him as though it were land given instead.⁵ Likewise, the election of a child to take

¹ *Bridges v. Hutchins*, 11 Ired. (N. C.) 68; *Bruce v. Slemph*, 82 Va. 352, 4 S. E. Rep. 692.

² *Bridges v. Hutchins*, 11 Ired. (N. C.) 68; *Cleaver v. Kirk's Heirs*, 3 Metc. (Ky.) 270.

³ *Simpson v. Simpson*, 114 Ill. 603, 2 N. E. Rep. 258; *Kershaw v. Kershaw*, 102 Ill. 307; *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. Rep. 482; *Galbraith v. McLain*, 84 Ill. 379; *Lockyer v. Savage*, 2 Str. 947; *Havens v. Thompson*, 26 N. J. Eq. 383; *Parson v. Ely*, 45 Ill. 232; *Bishop v. Davenport*, 58 Ill. 105.

⁴ *Coffman v. Coffman*, 41 W. Va. 8, 23 S. E. Rep. 523.

⁵ *Quarles v. Quarles*, 4 Mass. 680; *Bishop v. Davenport*, 58 Ill. 105;

Fitch v. Fitch, 8 Pick. (Mass.) 479; *Nesmith v. Dinsmore*, 17 N. H. 515; *Kenney v. Tucker*, 8 Mass. 143; *Powers' Appeal*, 63 Pa. St. 443; *Fitzgerald v. Vesthal*, 4 Sneed (Tenn.), 257; *Jenkins v. Stetson*, 9 Allen (Mass.), 128; *Lockyer v. Savage*, 2 Str. 947; *Lee's Ex'r v. Lee*, 2 Dev. (N. C.) 134; *Mastin v. Marlow*, 65 N. C. 695, 704; *Stover v. Eycleshimer*, 46 Barb. 84; *McBee v. Meyers*, 4 Bush (Ky.), 356; *Havens v. Thompson*, 26 N. J. Eq. 383; *Brands v. Dewitt*, 44 N. J. Eq. 545, 10 Atl. Rep. 181, 14 Atl. Rep. 894; *Appeal of Summerville*, 129 Pa. St. 631, 18 Atl. Rep. 554; *Curtis v. Curtis*, 40 Me. 24; *McDonald v. McDonald*, 5 Jones (N. C. Eq.), 211.

a distributive share in an estate according to his right of inheritance will be restricted to such share, and he cannot insist on a full portion of the estate and the advancement in addition, as this would be palpably inequitable after he has accepted the advancement in lieu of all right to participate as a distributee.¹ But if the advancement is made and accepted by the child in lieu of his interest in a certain kind of the estate of the parent, for instance, in lieu of a right of participation in the distribution of the realty, such agreement on the part of the child would not preclude him from participating in any part of the estate not forbidden by the terms of the advancement.² But such agreement as to the advancement would not entitle the child to participate in the distribution of any of the estate where the amount advanced and accepted by him in lieu of his right in some certain kind of the estate was equal to his distributive share or interest in all the estate. If his advancement is fully as much as his distributive share in all the estate, he could not, upon principle, participate in the general distribution of the estate of his ancestor without bringing his advancement into hotchpot.

§ 524. Conveyances between — Consideration — Love and affection.—The natural love and affection which all parents are presumed, in law, to entertain for their children, and the love a child has for his parents, is always regarded in law as a substantial and sufficient consideration upon which to ground a contract. So the rule is well recognized that a parent may convey property to his child, though no other consideration than love and affection prompt the act, where the transaction is in good faith and the material rights of creditors or others entitled to complain are not thereby prejudiced.³ If there be

¹ *McMahill v. McMahon*, 69 Iowa, 115, 28 N. W. Rep. 470.

² *Palmer v. Culbertson*, 143 N. Y. 213, 38 N. E. Rep. 199.

³ *Mixel v. Lutz*, 34 Ill. 382; *Townsend v. Westcoat*, 2 Beav. 340, 344; *Faloon v. McIntyre*, 118 Ill. 292, 8 N. E. Rep. 315; *Moritz v. Hoffman*, 35 Ill. 553; *Gridley v. Watson*, 58 Ill. 186; *Beener v. Edgington*, 76 Iowa, 105, 40 N. W. Rep. 117; *Hack v. Stew-*

art, 8 Pa. St. 213; *Herring v. Richards*, 3 Fed. Rep. 439; *Godell v. Taylor et al*, *Wright* (Ohio), 82; *Miller v. Thompson*, 3 Porter (Ala.), 196; *Clayton v. Dempsey*, 17 Ga. 217, 220, 221; *Grimes v. Russell*, 45 Mo. 431; *Worthington v. Shipley*, 5 Gill (Md.), 449; *Seward v. Jackson*, 8 Cowen, 406; *Doe v. Reavis*, 7 Ired. (N. C. Law), 341.

a good consideration in part, and the consideration as to the remainder be invalid for any cause, the whole transaction will not be held void. For instance, if a child should, in good faith, pay money or other valuable thing for the property conveyed, but such payment constituted only a part of the whole consideration, the remainder being love and affection merely, the transaction will be sustained as to the valid part of the consideration, and the grantee will be required to account to the injured party only for the excess value of the property over and above the valuable consideration.¹ And, generally, there must be an intent on the part of the parent in making the conveyance to his child that his creditors be thereby defrauded.² But, of course, if the act, considered in the light of all the surrounding circumstances, is inconsistent with a *bona fide* purpose, the law will supply the intent, as a man is conclusively presumed in law to intend and contemplate the natural, reasonable and necessary consequences of his act.³ If the facts are such that different intelligent conclusions might be arrived at by different persons, the issue on the question of fraud will be one of fact for the court or jury to determine;⁴ and, in any event, there is no fraud in any conveyance from a parent to a child of which creditors can complain if the parent reserves enough to pay all his debts.⁵ But the burden of proof will generally be on the child to show this fact.⁶

§ 525. Conveyances between — Valuable consideration.— It is not necessary in order to uphold a conveyance from a

¹ Patrick v. Patrick, 77 Ill. 555; Bullett v. Worthington, 3 Md. Ch. 399; State Bank v. Harrow, 26 Iowa, 426; Strong v. Lawrence, 58 Iowa, 55, 12 N. W. Rep. 74.

² Miller v. Thompson, 3 Porter (Ala.), 196.

³ Parish v. Murphree, 13 How. (U. S.) 92; Stewart v. Rogers, 25 Iowa, 395; Jessup v. Johnston, 3 Jones (N. C. Law), 335; Treadwell v. McEwen, 123 Ill. 253, 13 N. E. Rep. 850; Gallaher v. Martin, 33 Kan. 252, 6 Pac. Rep. 267.

⁴ Hinde's Lessee v. Longworth, 11 Wheat. 199, 210; Seward v. Jackson,

8 Cowen, 406, 423; Baum v. Sauer, 117 Mo. 460, 23 S. W. Rep. 147; Johnson v. Johnson, 36 Neb. 700, 55 N. W. Rep. 217; Hallock v. Alvord, 61 Conn. 194, 23 Atl. Rep. 131; Farris v. Farris (Ky.), 16 S. W. Rep. 346; Peregoy v. Krantz, 31 Neb. 58, 47 N. W. Rep. 422; Nichols v. Morrow, 58 Hun, 606, 11 N. Y. S. 878; Saar v. Finkin, 79 Iowa, 61, 44 N. W. Rep. 538; Vickers v. Woodruff, 78 Iowa, 400, 43 N. W. Rep. 266; Merritt v. Merritt (Ky.), 11 S. W. Rep. 593; Golver v. Flowers, 101 N. C. 534, 7 S. E. Rep. 579.

⁵ Miller v. Wilson, 14 Ohio, 108.

⁶ Miller v. Wilson, 14 Ohio, 108.

parent to a child, or *vice versa*, that the natural love and affection be looked to exclusively. Any other consideration will suffice as well, and in many instances a valuable and ample consideration will be sufficient to effect a good contract or conveyance between parent and child when a consideration of love and affection, without any other, would be held to be voluntary, if the rights or interests of third parties would be affected by the transfer. If a child be a creditor in good faith, or *bona fide* pay a valuable consideration in money or other property, a conveyance from a parent to a child will be as valid as though to a stranger. As a creditor or purchaser for value in good faith, the child or parent stands upon the same footing as third persons, and the law as fully protects their rights.¹ Of course the same rule applies in the case of a conveyance by a child to a parent in good faith and for a valuable consideration.² And the mere relationship of the parties to a transaction is not of itself any evidence of fraud, and raises no presumption thereof; and no clearer proof of good faith in transactions between parent and child is required than in the case of dealings

¹ Henderson v. Perryman (Ala.), 22 S. Rep. 24; Barr v. Church, 82 Wis. 382, 52 N. W. Rep. 591; Griffs v. Griffs, 89 Ga. 142, 15 S. E. Rep. 23; Brown v. McCormick, 135 Pa. St. 434, 19 Atl. Rep. 1026; Hayford v. Wallace (Cal.), 46 Pac. Rep. 293; Woodhull v. Wittle, 63 Mich. 575, 30 N. W. Rep. 368; Tarbell v. Millard, 63 Mich. 250, 29 N. W. Rep. 722; Murray v. First Nat. Bank, 5 Kan. App. 455, 49 Pac. Rep. 326; Rehling v. Byers, 94 Pa. St. 316; First Nat. Bank v. Kurtz, 22 Ill. App. 213; Linniger v. Herron, 18 Neb. 450, 25 N. W. Rep. 578; Close v. Benjamin (Pa.), 9 Atl. Rep. 51; Reinhard v. Brown (Ky.), 39 S. W. Rep. 705; Higgins v. White, 118 Ill. 619, 8 N. E. Rep. 808; Chase v. Horton, 143 Mass. 118, 9 N. E. Rep. 31; Nichols v. Bancroft, 74 Mich. 191, 41 N. W. Rep. 891; Proctor v. Cole, 104 Ind. 373, 4 N. E. Rep. 303; Goetter v. Norman, 107 Ala. 585, 19 S. Rep. 56; Mott v. Purcell, 98 Mo. 247, 11 S. W. Rep. 564; Collier v. French, 64 Iowa, 577, 21 N. W. Rep.

90; Micou v. First Nat. Bank, 104 U. S. 530; Leque v. Stoppel, 64 Minn. 74, 66 N. W. Rep. 208; Feldman v. Nicolai, 28 Oreg. 34, 40 Pac. Rep. 1010; Douglass v. Douglass, 41 W. Va. 13, 23 S. E. Rep. 671; First Nat. Bank v. Parsons, 42 W. Va. 137, 24 S. E. Rep. 554; Bleiler v. Moore, 68 Wis. 438, 60 N. W. Rep. 792; Lindsley v. Van Courtland, 67 Hun, 145, 22 N. Y. S. 222; Merchants' Nat. Bank v. Sears (Ky.), 20 S. W. Rep. 269.

² Coan v. Morrison, 34 Ill. App. 352; Peregoy v. Krantz, 31 Neb. 58, 47 N. W. Rep. 422; Stephens v. Breen, 75 Wis. 595, 44 N. W. Rep. 645; Coley v. Coley, 14 N. J. Eq. 352; Goetter v. Norman, 107 Ala. 585, 19 S. Rep. 56; Troy Fertilizer Co. v. Norman, 107 Ala. 677, 18 S. Rep. 201; Teague v. Lindsley, 106 Ala. 266, 17 S. Rep. 538; Snyder v. Jetton, 137 Ind. 449, 37 N. E. Rep. 142; Goodenow v. Friott, 89 Iowa, 671, 57 N. W. Rep. 437; Silvers v. Potter, 48 N. J. Eq. 539, 22 Atl. Rep. 584.

between strangers and third parties.¹ Transfers between parent and child or other near relatives, however, are always scrutinized closely by the courts when it is made to appear that the grantor is in debt to strangers who might suffer in their property rights should the conveyance be but voluntary.²

§ 526. Conveyances between — Fraud — General rule of invalidity.— That a parent has the right to convey to his child any property which he may have is well recognized. But this is only stating the general rule, which has its exceptions equally well recognized. So a parent will not be permitted in law to make a conveyance of his property to his child without any other consideration than his natural love and affection for him, where the result of such a transaction would be to prejudice the rights or interests of creditors, strangers or third parties. As to these, the conveyance stands upon the same ground as though made by the parent to a stranger instead of the child; and when the result of such a conveyance is necessarily the perpetration of a fraud by the parent upon his creditors, the conveyance, as to those thus injured, will be void.³ And such conveyance is void to the same effect, though there is no act-

¹ *Clewis v. Malone* (Ala.), 24 S. Rep. 767; *Harden v. Wagner*, 22 W. Va. 370; *Hermon v. McRae*, 91 Ala. 401, 8 S. Rep. 548; *Morrow v. Campbell* (Ala.), 24 S. Rep. 852; *Teague v. Lindsley*, 106 Ala. 266, 17 S. Rep. 538; *Oberholtzer v. Hazen*, 92 Iowa, 602, 61 N. W. Rep. 365; *Stephens v. Breen*, 75 Wis. 595, 44 N. W. Rep. 645; *Douglass v. Douglass*, 41 W. Va. 13, 23 S. E. Rep. 671; *First Nat. Bank v. Parsons*, 42 W. Va. 137, 24 S. E. Rep. 554; *Bleiler v. Moore*, 88 Wis. 438, 60 N. W. Rep. 792; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. Rep. 804; *Smith v. Collins*, 94 Ala. 394, 10 S. Rep. 334; *Brown v. McCormick*, 135 Pa. St. 434, 19 Atl. Rep. 1026; *Linniger v. Herroñ*, 18 Neb. 450, 25 N. W. Rep. 578.

² *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. Rep. 804; *Farrington v. Stone*, 35 Neb. 456, 53 N. W. Rep. 389; *Gregory v. Gray*, 88 Ga. 172, 14 S. E. Rep. 187; *Bartlett v. Cheesbrough*, 23 Neb.

767, 37 N. W. Rep. 652; *Kennedy v. Powell*, 34 Kan. 22, 7 Pac. Rep. 606.

³ *Jones v. Slubey*, 5 Harr. & J. (Md.) 372; *Ringgold v. Waggoner*, 14 Ark. 69; *Stewart v. Rogers*, 25 Iowa, 395; *Chase v. McCay*, 21 La. Ann. 195; *Snyder v. Free*, 114 Mo. 360, 21 S. W. Rep. 847; *Laughton v. Harden*, 68 Me. 208; *Shepard v. Iverson*, 12 Ala. 97; *Birdsall v. Lakey*, 6 La. Ann. 646; *Swartz v. Hozlett*, 8 Cal. 118; *Hammond v. McCorcle*, 2 Jones (N. C. Law), 444; *Winchester v. Reid*, 8 Jones (N. C. Law), 377, 380; *Godell v. Taylor*, *Wright* (Ohio), 82; *Miller v. Thompson*, 3 Porter (Ala.), 196; *Rousseau v. Luin*, 9 La. Ann. 325; *Worthington v. Shipley*, 5 Gill (Md.), 449; *Chamberlayne v. Temple*, 2 Rand. (Va.) 384; *Edington v. Williams*, *Wright* (Ohio), 439; *Amy v. Young*, 15 N. H. 522; *Robinson v. Stewart*, 10 N. Y. 189; *Geiger v. Welsh*, 1 Rawle (Pa.), 348; *Coleman v. Cocke*, 6 Rand.

ual fraudulent intent on the part of the grantee. The fraudulent purpose of the parent establishes the invalidity of the transaction without any inquiry into, or proof of, fraud on the part of the child.¹ If the father sells the property to his infant child, taking notes from him for the purchase-money, the transaction will nevertheless be void as to creditors whose rights would be affected, because the infant, not being *sui juris*, cannot bind himself to a contract of this nature, except subject to repudiation upon arriving at majority.² The conveyance will be void, too, though it be but the fulfillment of a promise of the parent, when he was solvent and free from debt, to make the transfer to the child. If he is insolvent at the time of the conveyance, and its effect is to leave creditors without the means of making their debt against the parent, the previous promise to convey to the child will not relieve the transaction of its fraudulent character as to creditors of the parent.³ That a conveyance of this kind is meant as a remuneration for domestic services which the child in law is required to render his parent in no sense changes the rule. For, unless the child be emancipated, he has no legal right to recover from his parent for his services; and a conveyance based upon such a consideration is void, because the consideration is not sufficient to sustain the agreement. In other words, such services are not a consideration as to creditors and third parties whose interests are affected by the transfer.⁴ And the rule is the same, though

(Va.) 618; *Miner v. Warner*, 2 Grant Cas. (Pa.) 448; *State Bank v. Harrow*, 26 Iowa, 426; *Sterry v. Arden*, 1 Johns. Ch. 261; *Addison v. Gage*, 79 N. Y. 102; *Guffin v. First National Bank*, 74 Ill. 259; *Zerbe v. Miller*, 16 Pa. St. 488; *Hill v. Mallory* (Mich.), 70 N. W. Rep. 1016; *Schumacher v. Bell*, 164 Ill. 181, 45 N. E. Rep. 428; *Hupp v. Hupp*, 61 Ill. App. 445; *Reynolds' Adm'rs v. Gawthorp's Heirs*, 87 W. Va. 3, 16 S. E. Rep. 364; *Younger v. Massey*, 39 S. C. 115, 17 N. E. Rep. 111; *Moore v. Beebe*, 82 Iowa, 421, 48 N. W. Rep. 726; *Parr v. Sanders* (Va.), 11 S. E. Rep. 979; *Lord v. Locke*, 62 N. H. 566; *Hudson v. Lyford*, 84 Cal. 505, 24 Pac. Rep. 286; *Ladd's*

Adm'r v. Brown (Ky.), 2 S. W. Rep. 120; *Gardner v. Kline*, 46 N. J. Eq. 90, 18 Atl. Rep. 457; *Peterson v. Rone*, 76 Iowa, 447, 41 N. W. Rep. 68; *Low v. Wartman*, 44 N. J. Eq. 193, 7 Atl. Rep. 654; *Blanchard v. Glasier*, 64 Iowa, 675, 21 N. W. Rep. 134.

¹ *Laughton v. Harden*, 58 Me. 208.

² *McCorcle v. Hamilton*, 2 Jones (N. C. Law), 444; *Porter v. Green* (Ky.), 9 S. W. Rep. 401.

³ *Rucker v. Abell*, 8 B. Mon. (Ky.) 566; *Hoye v. Penn*, 1 Bland (Md. Ch.), 28.

⁴ *Miller v. Sauerbier*, 30 N. J. Eq. 71; *Sanders v. Wagonseller*, 19 Pa. St. 248; *Snyder v. Free*, 114 Mo. 360, 21 S. W. Rep. 847; *Swartz v. Hozlett*, 8

the child may have attained his majority, where he continues to reside with his parents after arriving at full age, rendering domestic services and receiving support from his parent in return.¹

The rule is otherwise, however, where the child has been emancipated by the parent, for in such cases the infant is entitled to his earnings and the parent is not.² But in instances of this kind, where the conveyance would be fraudulent as to creditors unless there was some consideration to support it aside from natural love and affection, it devolves upon the child claiming his right by virtue of a valid and proper consideration of some property value to make affirmative proof accordingly.³ But the consideration for the conveyance will be good, though based on the services of the infant child, where these were rendered to the parent upon an express promise to pay for them, made in good faith, as this would be practically a manumission of the infant to the extent that he might have his own earnings, which is unquestionably within the power of the parent.⁴ And in no case would a creditor of the parent be permitted to complain unless the credit was extended before the conveyance or the parent made the transfer in contemplation of insolvency. For, if the transfer was made in good faith and without any intention of defrauding any one, the title would become vested and perfected by the conveyance, and could not be defeated by any subsequent act of the parent not connected with the conveyance nor made with reference thereto.⁵ And even where the parent is insolvent at the time of the conveyance, it will not be void as to subsequent creditors unless there was, at the time, actual fraud on the part of the parent in making the transfer, for the transfer may be for the purpose of settling a valid and legal liability or obligation.⁶ It makes no dif-

Cal. 118; *Hack v. Stewart*, 8 Pa. St. 213; *Fross' Appeal*, 105 Pa. St. 258; *Manseau v. Mueller*, 45 Wis. 430; *Spragee v. Waldo*, 38 Vt. 139; *Bullett v. Worthington*, 3 Md. Ch. 99; *Guffin v. First National Bank*, 74 Ill. 259.

¹ *Urdike v. Titus*, 13 N. J. Eq. 151; *King v. Malone*, 31 Gratt. (Va.) 158; *Hack v. Stewart*, 8 Pa. St. 213; *Hart v. Flinn*, 36 Iowa, 366; *Zerbe v. Miller*, 16 Pa. St. 488.

² *Bener v. Edgington*, 76 Iowa, 105, 40 N. W. Rep. 117.

³ *Snyder v. Free*, 144 Mo. 360, 21 S. W. Rep. 847.

⁴ *Manseau v. Mueller*, 45 Wis. 430; *Murray v. First Nat. Bank*, 5 Kan. App. 456, 49 Pac. Rep. 326.

⁵ *Mixell v. Lutz*, 34 Ill. 382; *Hinde's Lessee v. Longworth*, 11 Wheat. 199.

⁶ *Pepper v. Carter*, 11 Mo. 540. And see, along the same line, *Henry v. Fullerton*, 21 Miss. (13 S. & M.) 631.

ference in law whether the conveyance be direct or indirect; if it is made through the medium of third parties or otherwise indirectly, the same rule will govern, as the law looks through form to substance, and when the transfer is found to be in effect, though apparently not, the act of the parent, it will still be fraudulent where it would be so if the transaction was direct instead of circuitous.¹ Nor can the parent dispose of his labor to the prejudice of his creditors any more than he could his property. This is, in a sense, his capital and property. It is a means of acquiring property, and it would be an inconsistency in the law to forbid a person to dispose of his property with the fraudulent purpose of defeating his creditors and, at the same time, sanction the disposal of his personal labor and skill by which he acquires property. So where a father for a named consideration agrees to prosecute his calling, accounting to his son for all he may make, the agreement will be void as to creditors of the parent.²

§ 527. Fraudulent conveyance — Burden of proof.— Fraud is never presumed. While it may be a violent presumption to consider all persons honest *prima facie*, yet this is the charity of the law; and the principle is a salient one, for otherwise all persons would have to prove themselves honest before they could have a standing in court as entitled to the confidence and respect accorded persons of honor. The law wisely holds, therefore, that before a conveyance from a parent to a child can be successfully assailed as fraudulent, the party attacking it must show, by affirmative pleading and proof, facts sufficient to make out at least a *prima facie* case of fraud, and that he is in a position which entitles him to complain thereof. Otherwise his plea of fraud in the conveyance cannot be sustained.³ But when the creditor, seeking to set aside a convey-

¹ State Ban'k v. Harrow, 26 Iowa, 426; Elliott v. Horn, 10 Ala. (N. S.) 348; Coleman v. Cocke, 6 Rand. (Va.) 618. State Nat. Bank, 59 Ark. 614, 28 S. W. Rep. 431; Shauer v. Alerton, 151 U. S. 607, 14 Sup. Ct. Rep. 442; Smith v. Collins, 94 Ala. 394, 10 S. Rep. 334;

² Tripp v. Childs, 14 Barb. 85.

³ Doe v. Reavis, 7 Ired. (N. C. Law), 341; First Nat. Bank v. Parsons, 42 W. Va. 137, 24 S. E. Rep. 554; Tony v. McGehee, 38 Ark. 427; May v. Nichols v. Bancroft, 74 Mich. 191, 41 N. W. Rep. 891; Wylie v. Posey, 71 Tex. 34, 9 S. W. Rep. 87; Baughman v. Penn, 33 Kan. 504, 6 Pac. Rep. 890.

ance from a parent to a child, or *vice versa*, makes out a *prima facie* case of fraud, whether by proof of direct facts showing a want of good faith, or an absence of a property consideration, or by establishing facts showing a constructive fraud, the *onus* is then shifted to the person claiming by virtue of the conveyance to overcome these facts and circumstances by disproving them or otherwise showing a legitimate transaction.¹

§ 528. Conveyances between — Who may impeach.—While a voluntary conveyance from a parent to a child may be impeached by the creditors of the parent, and as to them declared fraudulent and void in law, whether the facts in the case make it one of actual or constructive fraud, yet others who are not creditors will not be heard to complain, as they are not injured upon the familiar principle that fraud without a resulting injury, can never be the basis of an action for relief by reason thereof. Further than this, the conveyance is valid, and must stand as between the parties. The parent who has made a fraudulent conveyance to his child cannot go into a court and have the same set aside as fraudulent and without consideration. For to permit this would enable the parent to profit by, and take advantage of, his own wrong.² Nor can creditors impeach a conveyance from a parent to his child where the same was made with the sanction and consent of the creditor;³ nor, further, where he has not been injured by the transaction, though it may be fraudulent.⁴

§ 529. Conveyances between — Rights of prior and subsequent creditors of parent.—The policy of the law with reference to the validity of conveyances between parent and child is practically the same whether the parent was indebted at the time or contemplated becoming so in making the transfer. In either case the creditor has been injured by the express or implied intent of the grantor, and the law will not permit the parent to thus prejudice his creditor to the profit and advan-

¹ Bartlett v. Cheesbrough, 23 Neb. 767, 37 N. W. Rep. 652; Strong v. Lawrence, 58 Iowa, 55, 12 N. W. Rep. 74; Zimmerman v. Miller, 64 Md. 276, 1 Atl. Rep. 858.

² Chamberlayne v. Temple, 2 Rand. (Va.) 384.

³ Pell v. Tredwell, 5 Wend. 661.

⁴ Varnett v. Knight, 7 Colo. 367, 8 Pac. Rep. 747.

tage of his child.¹ If the transfer necessarily operates to the prejudice of creditors of the parent, the conveyance will be void whether any actual intention to defraud existed in the parent or not.²

§ 530. Conveyance to bastard child — Effect of.— A conveyance of property by a father to his bastard child cannot rise, in law, to the dignity of a *bona fide* transaction for a valuable consideration. For, as the father is under no legal obligation whatever to support his bastard child, such transfer is a mere *nudum pactum*, and is held to be voluntary and of no force whatever.³ Such a conveyance, however, could not be attacked by the parent, as even a fraudulent conveyance is usually held to be valid as between the parties thereto. And the conveyance might be valid under local laws requiring a parent to support his bastard child as he is in law required to rear and care for his natural children. A person may convey property to his parent or child for a full and *bona fide* property or money consideration, though in so doing the property of the grantor is placed so it cannot be reached to satisfy a statutory liability to support a bastard child.⁴

§ 531. Right of parent to recover for injury to child — General rule.— The general rule of law is, the parent has a right of action against any wrong-doer who brings about an injury to his child, necessitating expense and nursing, and the furnishing of medical attention and kindred necessities, or by which the child is incapacitated, by reason of the injury, to render to his parent the services which a parent has the right to require at the hands of his child under the law.⁵ If the in-

¹ Wyman v. Brown, 50 Me. 139; R. R. Co., 35 Hun, 186; Louisville & Bailey v. Bailey, 61 Me. 361; Laugh- N. R. R. Co. v. Willis, 83 Ky. 57; Bur-
ten v. Harden, 58 Me. 208; Doe v. ton v. Missouri Pac. Ry. Co., 32 Mo.
Reavis, 7 Ired. (N. C. Law), 341. App. 455; Shields v. Yonge, 15 Ga.

² Parish v. Murphree, 13 How. (U. S.) 349; Lawyer v. Fritcher, 130 N. Y.
92; Brady v. Briscoe, 2 J. J. Marsh. 239, 29 N. E. Rep. 267; Sawyer v.
(Ky.) 212; Brice v. Meyers, 5 Ohio, 71; Sauer, 10 Kan. 519; Union Pac. R. R.
Robinson v. Stewart, 10 N. Y. 189. Co. v. Fort, 17 Wall. 553; Gardiner v.

³ Cacady v. Geonye, 6 Rich. (S. C. Kellogg, 23 Minn. 463; Buechner v.
Eq.) 103. Columbia Shoe Co., 60 Minn. 477, 62

⁴ Coan v. Morrison, 34 Ill. App. 352. N. W. Rep. 817; Pennsylvania Co. v.

⁵ Kennedy v. New York C. & H. R. Lilly, 73 Ind. 252; Binford v. John-

jury happen while the infant is in the employ of another, it makes no difference whether the employment was with or without the consent of the parent. The wrong-doer does not receive a license to injure the child simply because the parent may have consented to the employment. There is nothing in the consent of the parent that the child may work for another which could legitimately be construed to authorize a wrong by the employer.¹ And though the infant be injured there is no right of recovery by the parent therefor unless the injury be such as to cause loss of service or require, at the hands of the parent, some expense or outlay that otherwise would not have been necessary.² But medical services and all other necessary expense of the care and treatment of the injury are legal elements of damage arising from a physical injury to the child.³ The damages for the expenses in such cases, of course, are limited to the amount actually paid, or for which a liability has been, in good faith, incurred.⁴ Of course, too, it is not meant to deny the right of a parent to recover for the value of his time in caring for an infant injured at the hands of another when such care is necessary or proper. Such loss would unquestionably come within the scope of expenses of care and treatment, and whether so or not, there is surely a liability for them. The injury must be sued for, generally, by the father, as he is the natural guardian by law of his infant

son, 82 Ind. 426; *Brunswig v. White*, 70 Tex. 504, 8 S. W. Rep. 85; *Taylor v. Chesapeake & O. Ry. Co.*, 41 W. Va. 704, 24 S. E. Rep. 631; *Ft. Wayne, C. & L. Ry. Co. v. Byerle*, 110 Ind. 100, 11 N. E. Rep. 6; *Robel v. Chicago, M. & St. P. Ry. Co.*, 35 Minn. 84, 27 N. W. Rep. 305; *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. Rep. 793; *Railroad Co. v. Miller*, 49 Tex. 322; *Vaughn v. Rhodes*, 2 McCord (S. C.), 227; *Schmit v. Day*, 27 Oreg. 110, 39 Pac. Rep. 870; *Savannah, F. & W. Ry. Co. v. Smith*, 93 Ga. 742, 21 S. E. Rep. 157; *Stafford v. Rubens*, 115 Ill. 196, 3 N. E. Rep. 568; *Amos v. Atlanta Ry. Co. (Ga.)*, 31 S. E. Rep. 43.

¹ *Alabama Midland Ry. Co. v. McDonald (Ala.)*, 20 S. Rep. 472.

² *Houston & G. N. R. R. Co. v. Miller*, 49 Tex. 322; *Missouri, K. & T. Ry. Co. v. Edwards (Tex. Civ. App.)*, 32 S. W. Rep. 815.

³ *Union Pac. Ry. Co. v. Jones*, 21 Colo. 54, 40 Pac. Rep. 891; *San Antonio St. Ry. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. Rep. 752; *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. Rep. 793; *Netherland-American Steam Nav. Co. v. Hollander*, 59 Fed. Rep. 417, 20 U. S. App. 225; *Buck v. Power Co.*, 46 Mo. App. 555; *Frick v. St. Louis, K. C. & N. Ry. Co.*, 75 Mo. 542.

⁴ *Hart v. Railroad Co.*, 33 S. C. 427, 12 S. E. Rep. 9; *Cuming v. Railroad Co.*, 109 N. Y. 95, 16 N. E. Rep. 65; *San Antonio St. Ry. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. Rep. 752.

children. And, while he lives, being such, the mother has no right of action in her own behalf for an injury to her infant. If, however, the father be dead, the rule would be changed, for then the mother would, by operation of law, succeed to such guardianship, and, especially if there be no statutory guardian, she could ordinarily maintain an action against a third person for a wrong to her child. But the injury must occur after the death of the father, else the mother could not recover. For when it occurs in the life-time of the father, the right of action is in him or his estate, and does not shift upon his death to the mother.¹

§ 532. Right of parent to recover for injury to child—Contributory negligence of parent.—The right of a parent to recover from a wrong-doer for an injury to his child is forfeited when the negligence of the parent contributes to the bringing about of the injury. He can no more recover for an injury to his child which is brought about by his concurring negligence with the tort-feasor than he could recover from another for an injury to his own person to which his negligent act contributed. This principle is clearly established.² And the rule is sometimes extended to cases where the person to whom a parent intrusts his infant child is negligent, whereby such person contributes to the negligence of another in bringing about an injury to the child, so far as the right of the parent to recover in his own right is concerned.³ It is immaterial whether the injury be to the absolute or the relative rights of the parent. The rule in both cases is the same.⁴

¹ Geraghty v. New, 27 N. Y. S. 403.

² Iron Co. v. Brawley, 83 Ala. 371; Baltimore & O. R. R. Co. v. State, 30 Md. 47; St. Louis, I. M. & S. Ry. Co. v. Freeman, 36 Ark. 41; Glassey v. Hestonville, M. & F. P. Ry. Co., 57 Pa. St. 172; Chicago W. Div. Ry. Co. v. Ryan, 31 Ill. App. 621; Toledo, W. & W. Ry. Co. v. Grable, 88 Ill. 441; Wy-more v. Mahaska Co., 78 Iowa, 396, 43 N. W. Rep. 264; Albertson v. Keokuk & D. R. R. Co., 48 Iowa, 292; Evansville & C. R. R. Co. v. Wolf, 59 Ind.

89; Westerfield v. Roper, 43 La. Ann. 63, 9 S. Rep. 52; Winters v. Kansas City Cable Ry. Co., 99 Mo. 509, 12 S. W. Rep. 652.

³ Bellefontaine Ry. Co. v. Snyder, 24 Ohio St. 670; Lake Erie & W. R. Co. v. Pike, 31 Ill. App. 90; Toledo, W. & W. Ry. Co. v. Miller, 76 Ill. 276; Pratt Iron & Coal Co. v. Brawley, 83 Ala. 371.

⁴ Glassey v. Hestonville, M. & F. P. Ry. Co., 57 Pa. St. 172.

§ 533. Negligence of parent — Effect of poverty on degree of care required of parent.— The measure of caution in protecting a child from danger enjoined by law upon the parents is precisely the same whether the parent be rich or poor. The law does not fix one standard for the rich and another for the poor. And what would be negligence in one, as a general rule, would likewise be negligence in another. This being true, evidence of the wealth or poverty of the parent becomes immaterial and, for this reason, improper.¹

§ 534. Injury to child — Right of parent to recover — Negligence of parent — Instances where parent held not negligent.— It is not always negligence in a parent, such as will defeat a recovery for an injury to his infant child, to permit the child to go upon the streets of a town or city. If due care is exercised in so doing, the fact that the child may have been out of sight, or even beyond the temporary control of the parent, will not bar a recovery for a wrongful injury to the infant at the hands of another.² If it were required that parents must at all times and under all circumstances keep their children under their immediate control and observation, they might be seriously hampered in performing their other duties, and this the law does not impose. Upon this principle it is held that it is not negligence in a parent to permit a very young child to go upon a street attended by a child several years older.³ Nor is it negligence *per se* for parents to permit a child eight years old to go unaccompanied in a city by any one.⁴ The parents are not guilty of negligence, as matter of law, where their child, four years of age, strays two blocks from home and is injured by coming in contact with unguarded and dangerous premises.⁵

¹ Hagan's Petition, 5 Dillon, 96; Delphi v. Lowery, 74 Ind. 520; Mayhew v. Burns, 103 Ind. 328, 2 N. E. Rep. 793.

² Stafford v. Rubens, 115 Ill. 196, 3 N. E. Rep. 568; Commonwealth v. Metropolitan R. R. Co., 107 Mass. 236; Mulligan v. Curtis, 100 Mass. 512; Chicago v. Hesing, 83 Ill. 204.

³ Chicago W. Div. Ry. Co. v. Ryan, 31 Ill. App. 621; Stafford v. Rubens, 115 Ill. 196, 3 N. E. Rep. 568; Huff v.

Ames, 16 Neb. 139, 19 N. W. Rep. 623; Mayhew v. Burns, 103 Ind. 328, 3 N. E. Rep. 793; Commonwealth v. Metropolitan R. R. Co., 107 Mass. 236; Newman v. Phillippsburg, H. & C. R. R. Co., 52 N. J. L. 446; Chicago & A. R. R. Co. v. Becker, 84 Ill. 483.

⁴ Drew v. Sixth Ave. R. R. Co., 26 N. Y. 49.

⁵ Morgan v. Illinois & St. L. B. Co., 5 Dill. 96.

§ 535. **Negligence of parent — Question of fact.**— The parent is not necessarily guilty of contributory negligence in permitting his child to get beyond his immediate sight and control so as to bar his right of action for an injury at the hands of another. So, in all cases where the facts are not such as to fix contributory negligence upon the parent as a matter of law, that is, where it is not so palpable that no two intelligent minds could reasonably draw a conclusion different from that of contributory negligence in the parent, no matter how young or how old the injured infant, the issue of negligence on the part of the parent and of due care upon the part of the alleged wrongdoer should be submitted to a jury, who will consider all the facts and circumstances of the case in the light of its surroundings, including the age, intelligence, prudence and like qualities of the child.¹ The mere fact, therefore, that a child so young as not to be capable in law of negligence goes or is found upon dangerous premises or in a dangerous place, is not conclusive evidence, of itself, of the negligence of his parents, but *prima facie* only.² Each case must depend largely upon its own peculiar facts and circumstances, and when these make the question of negligence on the part of the parent doubtful, the issue of negligence becomes one of fact.³

§ 536. **Right of parent to recover for injury to child — Extent of recovery — Death.**— The common law does not recognize the right to recover for services after the death of any one, nor any right of action for the killing alone. Death ended the ability to serve, and the right of the parent to recover for the services of the injured child were such only as were lost by reason of the wrong before death ensued and before the child reached majority.⁴ This being true, the parent

¹ Mulligan v. Curtis, 100 Mass. 512; Commonwealth v. Metropolitan R. R. Co., 107 Mass. 236; Ewing v. Chicago & N. W. Ry. Co., 38 Wis. 613.

² St. Louis, I. M. & S. Ry. Co. v. Freeman, 36 Ark. 41.

³ Huff v. Ames, 16 Neb. 136, 19 N. W. Rep. 623; Battishill v. Humphreys, 64 Mich. 514, 31 N. W. Rep. 894; Thurber v. Harlem Bridge & F. R. R. Co., 60 N. Y. 326; Lynch v. Smith, 104

Mass. 52; Atchison, T. & S. F. R. R. Co. v. Smith, 28 Kan. 511, 557; Westbrook v. Mobile & O. R. R. Co., 66 Miss. 560, 6 S. Rep. 321; Winters v. Kansas City Cable Ry. Co., 99 Mo. 509, 12 S. W. Rep. 652.

⁴ Davis v. St. Louis, I. M. & S. R. Co., 53 Ark. 117, 13 S. W. Rep. 801; Mayhew v. Burns, 103 Ind. 328, 2 N. E. Rep. 793; Hyatt v. Adams, 16 Mich. 180; Baker v. Bolton, 1 Camp.

could recover nothing for funeral expenses, as these are matters pertaining to the burial, not to the care of the sick or injured or the prolonging of life.¹ So, if death should immediately result from the injury, there could be no recovery.² The parent, however, can recover, not only for the actual loss of service from the time of the injury to the time of the trial of the action for damages, but for the expense of treatment and cure of the child until he reaches his majority, as well as for any additional expense of raising the child to maturity which may become necessary as a result of the injury.³ But there is no right of recovery for exemplary damages where the injury results in death;⁴ though it has been held that when death does not at once occur, the loss of service, expense of nursing, together with the expense of the sickness of the parent caused by the shock, when specially pleaded, may be recovered;⁵ though if the shock takes place subsequent to death, there is no right of recovery.⁶

N. P. 493; *Books v. Danville*, 95 Pa. St. 158; *Kramer v. San Francisco M. St. Ry. Co.*, 25 Cal. 434; *Morris, Adm'r, v. Chicago, M. & St. P. R. R. Co.*, 26 Fed. Rep. 22; *Citizens' St. Ry. Co. v. Willooby*, 15 Ind. App. 312, 43 N. E. Rep. 1058; *Sullivan v. Union Pac. R. R. Co.*, 2 Fed. Rep. 447; *Sherman v. Johnson*, 58 Vt. 40, 2 Atl. Rep. 707; *Jackson v. Pittsburg, C., C. & St. L. Ry. Co.*, 140 Ind. 241, 39 N. E. Rep. 663; *Corey v. Berkshire R. R. Co.*, 1 Cush. (Mass.) 475; *Rockford, R. I. & St. L. R. R. Co. v. Delaney*, 82 Ill. 188. And see *Cutting v. Seabury*, 1 Spr. 522.

¹ *Jackson v. Pittsburg, C., C. & St. L. Ry. Co.*, 140 Ind. 241, 39 N. E. Rep. 663.

² *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. Rep. 793; *Osborn v. Gillett*, L. R. 8 Exch. 88; *Buswell, Personal Inj.*, § 15; *Cooley, Torts* (2d ed.), p. 308; *Hyatt v. Adams*, 16 Mich. 180; *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754; *Kramer v. San Francisco M. St. R. R. Co.*, 25 Cal. 434; *Green v. Hud-*

son River R. R. Co., 41 N. Y. 294; *Sherman v. Johnson*, 58 Vt. 40, 2 Atl. Rep. 707; *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. R. Co.*, 25 Conn. 265; *Railroad Co. v. Kelly*, 23 Ind. 133; *Green v. Railroad Co.*, 2 Keyes (N. Y.), 294; *Hughb v. Railroad Co.*, 6 La. Ann. 495; *Gulf, C. & S. F. Ry. Co. v. Beall* (Tex. Civ. App.), 42 S. W. Rep. 1054. See, too, as illustrating the rule, *Burns v. Grand Rapids & I. R. R. Co.*, 113 Ind. 169, 15 N. E. Rep. 230; *Baker v. Bolton*, 1 Camp. N. P. 493; *Gann v. Worman*, 69 Ind. 458, 461; *Hindry v. Holt* (Colo.), 51 Pac. Rep. 1002.

³ *Drew v. Railroad Co.*, 26 N. Y. 49; *Cumming v. Brooklyn City Ry. Co.*, 109 N. Y. 95, 16 N. E. Rep. 65. See, too, *San Antonio St. Ry. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. Rep. 752.

⁴ *Sherman v. Johnson*, 58 Vt. 40, 2 Atl. Rep. 707.

⁵ *Ford v. Monroe*, 20 Wend. 210.

⁶ *Baker v. Bolton*, 1 Camp. N. P. 493.

§ 537. **Right of mother to recover for injury to child — Common-law rule.**— At common law there was no right of action in the mother for an injury to her minor child while the father was living. The substructure of this right of action being the loss of services of the child, it is clear that there could be no recovery unless there was, at the same time, a right to the services and earnings of the injured infant. This being in the father so long as he lived, the mother could not recover.¹ In Indiana the mother, in case of the death, desertion or imprisonment of the father, may maintain an action for the death of, or an injury to, her infant child.² But in an action under the statute, as it enlarges the common-law remedy, it must be strictly alleged and proven that the father is dead, or has deserted or been imprisoned, before a recovery can be had.³ The mere allegation that the mother is a widow is not sufficient to enable her to recover.⁴ And in an action by a mother under this statute, she cannot recover for an injury to an adopted child without proving a regular adoption and corresponding incidental right to services, which latter must be established by showing that the natural parent is either dead or has renounced the right to the services of the child.⁵ The mother, however, may recover for such an injury to her infant child where she has been abandoned by her husband and has the care and custody of the child and supports it with her own exertions and means, the father lending no assistance in this direction;⁶ or where the father is dead.⁷ And a person though

¹ *Citizens' St. Ry. Co. v. Willooby*, 15 Ind. App. 312, 43 N. E. Rep. 1058.

² *Rev. St. Ind. 1881, § 266; Louisville, E. & St. L. R. R. Co. v. Lohges*, 6 Ind. App. 288, 33 N. E. Rep. 449; *Citizens' St. R. R. Co. v. Willooby*, 15 Ind. App. 312, 43 N. E. Rep. 1058. And see *Hennessey v. Bavarian Brewing Co. (Mo.)*, 46 S. W. Rep. 966.

³ *Louisville, E. & St. L. R. R. Co. v. Lohges*, 6 Ind. App. 288, 33 N. E. Rep. 449; *Citizens' St. R. R. Co. v. Willooby*, 15 Ind. App. 312, 43 N. E. Rep. 1058.

⁴ *St. Louis, I. M. & S. Ry. Co. v. Yocum*, 34 Ark. 493.

⁵ *Citizens' St. R. R. Co. v. Willooby*, 15 Ind. App. 312, 43 N. E. Rep. 1058.

⁶ *Savannah, F. & W. Ry. Co. v. Smith*, 93 Ga. 742, 21 S. E. Rep. 157; *Amos v. Atlanta Ry. Co. (Ga.)*, 31 S. E. Rep. 43.

⁷ *Horgan v. Pacific Mills*, 158 Mass. 402; *Abeles v. Bransfield*, 19 Kan. 16; *Whitaker v. Warren*, 60 N. H. 20; *Camerlin v. Palmer*, 10 Allen (Mass.), 539; *Harmond v. Corbett*, 50 N. H. 501; *Railroad Co. v. Cook*, 63 Miss. 88; *Union News Co. v. Morrow (Ky.)*, 46 S. W. Rep. 6.

not a natural parent may recover for an injury to a child where he or she, as the case may be, stands *in loco parentis* to it and is entitled to the services of the infant in like manner as the natural parent would be.¹

§ 538. Right of parent to recover for injury to child—Assumed risks.—While a parent is entitled to recover from another who wrongfully injures his infant child, yet the rule does not apply if the parent permits his child to be employed in an occupation of known hazard, the danger of which is apparent to the parent as well as to the child or any one of ordinary common sense. In such cases the parent cannot recover for an injury which may result from the undertaking or employment.² But this applies only to risks strictly within the contract of service. If the master who employs the infant places him under another with instructions to obey such other, and, in obeying accordingly, the infant does an act not within the scope of his contract of employment, and is injured because of the greater hazard of the undertaking, which is unknown and unexplained to the infant, the master will be liable to the parent just the same as though the master had himself personally directed the hazardous undertaking.³ The same is true where the child is employed with the consent of the parent in a hazardous occupation, and without the knowledge or consent of the parent is directed to do work more hazardous, at which he is injured.⁴ And it has been held that a father may recover for an injury to his child who has been working for a railroad company, and is injured in doing casual service for his master, though without the knowledge of any of the managing officers of the company, where the service was performed without the knowledge or consent of the father, but at the request of a conductor of one of the trains of the company.⁵

¹ Whitaker v. Warren, 50 N. H. 20.

² Gulf, C. & S. F. Ry. Co. v. Redeker, 75 Tex. 310, 12 S. W. Rep. 855; Union Pac. R. R. Co. v. Fort, 17 Wall. 553; Weaver v. Iselin, 161 Pa. St. 386, 29 Atl. Rep. 49; Wolf v. East Tenn., Va. & Ga. Ry. Co., 88 Ga. 210, 14 S. E. Rep. 190.

³ Union Pac. R. R. Co. v. Fort, 17 Wall. 553.

⁴ Weaver v. Iselin, 161 Pa. St. 386, 29 Atl. Rep. 49; Texas & N. O. Ry. Co. v. Wood (Tex. Civ. App.), 24 S. W. Rep. 569.

⁵ Louisville & N. R. R. Co. v. Willis, 83 Ky. 57.

§ 539. **Right of parent to recover for injury to child by a third person where the infant is employed without the consent of the parent.**—The general rule, which is well recognized by authority, as well as supported by principle, is, where a stranger employs an infant without the consent of the parents, and by reason of such employment the infant is injured, whereby the parent loses his services, or is required to be at expense for medical treatment and attention, or both, the third person thus bringing about the loss is liable to the parent for the expenses of the sickness or disability brought about by the injury, as well as for the loss of services of the child.¹ This being true, it necessarily follows that a payment made to an infant for an injury thus inflicted upon him by a third party would not bind the parent nor preclude a recovery by him, just as though no such payment had been made; for the wrong-doer must make satisfaction for the injury he inflicts to the proper party at his peril.² And as the father has the general right of custody of his child and the right to his services, he cannot be defeated in this right by evidence that the infant was employed with the consent of the mother.³ And it is not necessary that the father notify the wrong-doer that he does not consent to the service.⁴ But it seems that it is necessary, in order to assert a right of recovery by the parent in such a case, to show that the wrong-doer knew of the infancy of the child.⁵ If the facts and surroundings are such, however, as to charge a person of ordinary intelligence with notice or knowledge that the child is not grown; as, for instance, if his appearance be such that no person of common sense could mistake

¹ *Gulf, C. & S. F. Ry. Co. v. Redeker*, 75 Tex. 310, 12 S. W. Rep. 855; *Railroad Co. v. Showers*, 71 Ind. 451; *Taylor v. Chesapeake & O. Ry. Co.*, 41 W. Va. 704, 24 S. E. Rep. 631; *Gulf, C. & S. F. Ry. Co. v. Vieno*, 7 Tex. Civ. App. 347, 26 S. W. Rep. 230; *Fort Wayne, C. & I. Ry. Co. v. Byerle*, 110 Ind. 100, 11 N. E. Rep. 6; *Foster v. Stewart*, 3 Mau. & Sel. 91; *James v. Le Roy*, 6 Johns. 273; *Netherland-American Steam Nav. Co. v. Hollander*, 59 Fed. Rep. 417, 20 U. S. App. 225; *Railway Co. v. Miller*, 49 Tex.

322; *Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. Rep. 581.

² *Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. Rep. 581.

³ *Gulf, C. & S. F. Ry. Co. v. Redeker*, 75 Tex. 310, 12 S. W. Rep. 855.

⁴ *Gulf, C. & S. F. Ry. Co. v. Redeker*, 75 Tex. 310, 12 S. W. Rep. 855.

⁵ *Cutting v. Seabury*, 1 Spr. 522; *Gulf, C. & S. F. Ry. Co. v. Redeker*, 67 Tex. 190, 2 S. W. Rep. 527; *Gulf, C. & S. F. Ry. Co. v. Vieno*, 7 Tex. Civ. App. 347, 26 S. W. Rep. 230.

his minority, the wrong-doer would, upon principle, not be permitted to plead such ignorance. And in a case of doubt in this respect, the question whether the stranger should have known of the infancy of the child would be one to submit to the jury as a question of fact. The mere fact that the parent may know of the employment of his child by another will not relieve such stranger from liability to the parent for the loss of services of the child, but only for the expenses incident to the injury.¹ If the right of action is based on the want of consent of the parent to the employment of the child, this must be alleged and proved.²

§ 540. Enticing away minor — Right of parent to recover for the tort.—If one entices away the infant child of another, whether for the purpose of employing him or not, he will become liable to the parent for the value of the services of the child during the time he has thus detained him until his majority, where he is thus detained until reaching full age.³ But in order to recover for such an injury as this, the parent must aver and prove knowledge on the part of the wrong-doer that the child was under age, or show such facts as would naturally and necessarily charge any person of ordinary intelligence with notice that such was the case;⁴ though no action lies for an injury of this kind unless the party against whom the complaint is made in some way counsels, advises, abets, or otherwise promotes or encourages the infant to remain away from the parent. That the child chooses to remain away after being hired by another with the original consent of the parent is not sufficient to establish an enticing away or an injury by reason of such absence of the child.⁵ So where an infant leaves the service of his father and seeks work with a stranger, who at first refuses to employ him because of his infancy, but upon assurance from the child that his father had given

¹ *Gulf, C. & S. F. Ry. Co. v. Redeker*, 67 Tex. 190, 2 S. W. Rep. 527.

² *Gulf, C. & S. F. Ry. Co. v. Vieno*, 7 Tex. Civ. App. 347, 26 S. W. Rep. 230.

³ *Ft. Wayne, C. & L. Ry. Co. v. Byerle*, 110 Ind. 100, 11 N. E. Rep. 6.

⁴ *Butterfield v. Ashley*, 3 Gray

(Mass.), 254; *Caughey v. Smith*, 47 N.

Y. 244; *Butterfield v. Gray*, 6 Cush.

(Mass.) 249; *Gulf, C. & S. F. Ry. Co.*

v. Redeker, 67 Tex. 190, 2 S. W. Rep. 527.

⁵ *Loomis v. Deets* (Md.), 30 Atl. Rep.

612.

consent for him to find work where he might, whereupon, relying on this assurance, he was employed by the stranger, no cause of action will arise in favor of the parent for enticing the child away.¹ If a parent induce his infant child to leave his wife, no action will lie therefor unless the act was done wantonly; for the parent may believe this to the best interest of his child. But if he does this wilfully and unnecessarily, he will be liable in damages.²

§ 541. Injury to child — Right of parent to recover — English and American rule.— In England the courts lean to the strict fiction that the right of recovery by a parent for an injury to his infant child is grounded in the theory that the parent, by reason of the injury, has lost some service of his child, and that if the child be too young to render any services there can be no recovery at all, even for necessary medical treatment.³ But in this country a more liberal and enlightened idea prevails. Here a recovery can be had, no matter how young the child may be at the time of the injury, if it is living with its parents. The fiction of loss of services is held to be appeased by the supposed nominal services which an infant, however young, is supposed to render, and, together with the fixed right to the services of a minor child by the parent, are taken to be sufficient to justify a recovery for all the damages incident to an injury to a very young child, such as medical attention, care and nursing,—the recovery for loss of services, when the child is so young as not to be able to render any appreciable help, being merely nominal.⁴

§ 542. Liability of stranger to parent for injury by reason of the improper employment of his child in hazardous work. Where one employs an infant in a dangerous or hazardous business without the knowledge or consent of the parent, express

¹ *Butterfield v. Ashley*, 6 Cush. 417, 20 U. S. App. 225; *Clark v. Bayer*, 32 Ohio St. 300; *Sykes v. Lawlor*, 49

² *Brown v. Brown* (N. C.), 32 S. E. Rep. 320. Cal. 236; *Durden v. Barnett*, 7 Ala. 169; *Cumming v. Brooklyn City R.*

³ *Grinnell v. Wells*, 7 Man. & G. 1041. R. Co., 109 N. Y. 95, 16 S. E. Rep. 65; *Sawyer v. Sauer*, 10 Kan. 519; *Morris*

⁴ *Dennis v. Clark*, 2 Cush. (Mass.) 347; *Netherland-American Steam Nav. Co. v. Hollander*, 59 Fed. Rep. 22. v. Chicago, M. & P. R. R. Co., 26 Fed. Rep. 22.

or implied, such third person is liable to the parent for any injury to the infant by reason of such employment which results in a loss of real or nominal services to the parent.¹ Nor can the tort-feasor, in an action by a parent for an injury, under such circumstances, plead the contributory negligence of the infant as a defense. A parent cannot be deprived of his right to the services of his infant child by a stranger who, without consent, employs the minor, in which employment the child is injured and his usefulness impaired as a servant of his parents. That the child himself brought about the injury by his own contributory or concurring negligence cannot avail.² And the principal will be liable to the parent for an injury to his child of immature years, because of which he cannot properly appreciate or comprehend the danger, where his servants, in the performance of their duties, invite and prevail upon the child to do a hazardous thing, whereby he is injured by machinery or appliances operated in the usual course of the master's business.³ But there is no liability of a stranger to a parent for an injury to his child unless the injury be the result of negligence or omission of duty by the third party, though the infant is employed by him without the knowledge of the parent.⁴

§ 543. Right of parent to recover for injury to child — Limit of recovery.—The right of a parent to recover from a stranger for an injury to his child being based, in part at least, upon the theory that the parent is entitled to the services and assistance, in a domestic way, of the child during minority, it necessarily follows that whenever this species of service is impaired, diminished or totally taken away by an injury to the infant, not resulting in instant death, the right of recovery in the parent at once attaches, though it is confined in extent, under the common-law rule, to the consequences of the wrong. If it should be such as to totally disable the child from future services, a recovery might be had for the loss of service from the time of the injury until the child arrived at majority. If

¹ *Texas & P. Ry. Co. v. Brick*, 83 Tex. 526, 18 S. W. Rep. 947. *gers* (Tex. Civ. App.), 39 S. W. Rep. 380.

² *Texas & P. Ry. Co. v. Brick*, 83 Tex. 526, 18 S. W. Rep. 947. ⁴ *Williams v. Southern Ry. Co.* (N. C.), 28 N. E. Rep. 867.

³ *Missouri, K. & T. Ry. Co. v. Rod-*

the capacity to serve the parent should only be diminished, but not totally taken away, the measure of recovery would be the difference in the value of the services of the child as he is after the injury, and the value of the same had he not been injured, confining the period, of course, to minority.¹

§ 544. Injury — Waiver of right to recover by parent.— The right which the law gives a parent to recover for an injury to his child may be waived, just as may any other privilege. It is accordingly held that where a parent whose child has been injured sues the wrong-doer as the next friend of such infant, and in such action pleads facts which entitle the parent to recover in his individual right, this will amount to a waiver or estoppel of record on the part of the parent of any subsequent right to recover for the same injury to the child, which, but for such pleading, may have been actionable in behalf of the parent.² But the fact that the parent sued as next friend of his child for the injuries recoverable will not preclude him from asserting a cause of action for damages resulting to himself as parent by reason of the same injury which authorized the recovery of damages on behalf of the child.³ If the parent has properly transferred the right to the service, as well as relinquished the custody and control of his child, to grandparents or others who assume to and do act and stand *in loco parentis* to the child, such stranger may maintain an action against a wrong-doer for an injury to the child where the wrong took place during the period of such care, control and custody.⁴

§ 545. Right of parent to recover for injury to child — Pleading.— Ordinarily, at least in the code states, any pleading setting up the loss of services of an infant by the parent is sufficient which alleges the relation of parent and child, the minority of the latter, and the consequent right of the parent to

¹ Schmitz v. St. Louis, I. M. & S. Ry. Co., 46 Mo. App. 380; Frick v. St. Louis, K. C. & N. Ry. Co., 75 Mo. 542;

Goodrich v. Burlington, C. R. & N. Ry. Co. (Iowa), 66 N. W. Rep. 770; S. App. 225; Texas & P. Ry. Co. v. Morin, 66 Tex. 225, 18 S. W. Rep. 503.

Netherland-American Steam Nav. Co. v. Hollander, 59 Fed. Rep. 417, 20 U. S. App. 225, 18 S. W. Rep. 503.

² Abeles v. Bransfield, 19 Kan. 16;

³ Texas & P. Ry. Co. v. Morin, 66 Tex. 225, 18 S. W. Rep. 503.

⁴ Clark v. Boyer, 32 Ohio St. 299.

the service of the infant, and the facts constituting the ground of recovery with reasonable certainty. It is not necessary to also allege that the child was, at the time of the injury, the servant of the parent, for this inference arises by operation of law. It is always presumed, and if the relation of master and servant does not exist it must be met by an affirmative defense.¹ In other words, the burden of showing that the parent is not entitled to the services of his infant child is on the party seeking to evade a liability upon this ground.

§ 546. Right to recover for injury to child — Prospective damages.— If an infant be so injured that his usefulness as a servant of his parents during minority is necessarily curtailed or totally extinguished, damages may always be recovered for any injury which may reasonably, naturally and properly be expected to result, for the full period of minority, though the future damages may not have accrued at the time of the action.² And in determining such prospective damages no deduction can be made for the subsequent cost and expense of supporting the infant to majority; but the inquiry is: What is the probable value of the gross earnings of the child during infancy, less his capacity to serve in his injured and impaired condition?³ The right of recovery is not confined to the value of the earnings of the child, or his services during minority, less the cost of food and clothing, as such a criterion would deprive the parent of any right of recovery for medical attention, nursing and other expenses and outlay incident to, and necessary because of, the injury to the child.⁴

§ 547. Right of parent to recover for injury to child — Nursing and medical attention as elements of damages.— Where an infant is so injured that medical attention and nursing are required, the wrong-doer who has necessitated these

¹ *Buck v. Power Co.*, 46 Mo. App. 555; *Sawyer v. Sauer*, 10 Kan. 519. *vania R. R. Co.*, 177 Pa. St. 10, 35 Atl. Rep. 191.

² *Dollard v. Roberts*, 130 N. Y. 269, 29 N. E. Rep. 104; *Cuming v. Railroad Co.*, 109 N. Y. 95, 16 N. E. Rep. 65; *Drew v. Railroad Co.*, 26 N. Y. 49; *Mauerman v. Railroad Co.*, 41 Mo. App. 348; *Schmitz v. St. Louis, L. M. & S. Ry. Co.*, 46 Mo. App. 380.

³ *Texas & P. Ry. Co. v. Morin*, 66 Tex. 133, 18 S. W. Rep. 345.
⁴ *Dollard v. Roberts*, 55 Hun. 607, 8 N. Y. S. 432; *Goodhart v. Pennsyl-*

expenses may be required to respond in damages for such expenses as are legitimately connected with, and flowing from, the tort. This is in addition to, and aside from, the liability for the loss of the services to the parent; for, by the injury, the tort-feasor has not only deprived the father of the services of his child, but has, in addition, made expenditures for medicine and nursing necessary.¹ And it is not necessary that the parent engage a stranger to do the nursing. The parent himself may do this when his personal attention is necessary, and may recover a reasonable compensation for such services. This is entirely proper, for the wrong-doer has made it necessary because of his tort, and has thereby necessitated the giving up of the regular work of the parent, perhaps, and a compensation for the services of the parent in thus nursing his injured children, under such circumstances, is deemed entirely proper.² It would seem, upon principle, that the recovery by the parent, in cases of this kind, for services in nursing should not exceed the value of the particular services. The parent may be able to make at his calling much more than a thoroughly competent nurse could be hired for, but it hardly seems just to compel the wrong-doer to pay for what the time of the parent might be worth at his business or calling. A father whose child has been injured may, generally speaking, recover from the tort-feasor the value of the services of his wife in nursing the child. For, at common law, the husband is entitled to the services of the wife, and if the wrong-doer has made it necessary to neglect her ordinary domestic duties to attend to her child, the husband should be allowed to recover the value of such services in nursing.³ But he cannot recover for the services of his wife or other members of his household unless the nursing required of and done by them necessarily deprived him of their services. If there has been no loss of services which would have been rendered to the head of the family, he

¹ *Schmitz v. St. Louis, I. M. & S. Ry. Co.*, 46 Mo. App. 380; *Woekner v. Erie Electric Motor Co.*, 182 Pa. St. 182, 37 Atl. Rep. 936; *Missouri, K. & T. Ry. Co. v. Rodgers* (Tex. Civ. App.), 39 S. W. Rep. 383; *Frick v. St. Louis, K. C. & N. Ry. Co.*, 75 Mo. 542; *Pennsylvania R. R. Co. v. Kelly*, 31 Pa. St. 372.

² *Schmitz v. St. Louis, I. M. & S. Ry. Co.*, 46 Mo. App. 330.

³ *Martin v. Wood*, 52 Hun, 613, 5 N. Y. S. 274; *Woekner v. Erie Electric Motor Co.*, 182 Pa. St. 182, 37 Atl. Rep. 936.

has not been injured, and, not having been damnified, has no right of recovery.¹

§ 548. **Injury to child — Mental suffering as an element of damages.**— Generally the pain of mind which an infant may suffer by reason of a personal injury at the hands of a stranger is not an element of damages for which the parent will be entitled to recover. Such right, as to this special kind of damage, is personal to the infant.² But where the pain which the child suffers is such as to incapacitate him for service to his parent, the latter will be entitled to compensation for the loss of services caused by the pain to the child.³ This, however, is certainly as far as the rule should be extended.

§ 549. **Right of parent to recover for death of child — Lord Campbell's Act.**— By the common law there could be no recovery for an injury which resulted in death nor for any injury resulting from death, no matter how wrongful the act bringing about death might be. In order to cure this defect in the law, the English parliament passed an act, commonly known as Lord Campbell's Act, providing for a right of recovery in such instances. This act provided "that wheresoever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damage in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured; and although the death shall have been caused under such circumstances as amount in law to a felony."⁴ The act further provided: "And every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they think propor-

¹ Goodhart v. Pennsylvania R. R. Co., 177 Pa. St. 10, 85 Atl. Rep. 191; Woeckner v. Erie Electric Motor Co., 182 Pa. St. 182, 87 Atl. Rep. 936.

² Walker v. Second Ave. R. R. Co., 6 N. Y. S. 536.

³ Walker v. Second Ave. R. R. Co., 6 N. Y. S. 536.

⁴ Stat. 9 and 10 Vict., ch. 93, § 1.

tioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."¹ It is noticeable that the act thus passed is deficient in not providing any remedy in cases where there was no executor or administrator. To obviate this defect, an amendment to the original act was subsequently passed, providing, further, that where there is no executor or administrator, the action for the injury by death might be brought by any of the persons for whose benefit the action could have been maintained by an executor or administrator.² Statutes moulded with more or less modifications after the English act have now become common in the American states as a part of the fixed law of the land, and require more than a passing notice. By virtue of these laws the parent may sue for the death of the child, and the child for the death of his parent, which could not be done at common law. The court of queen's bench, in construing the English act, has held that no recovery can be had by the executor or next of kin where the injury did not result at once in death; as where a person is injured for a time, and, before death ensues, he is paid a satisfaction for the wrong, which he accepts in full of all liability. This is upon the theory that the English act authorizes a recovery only in cases where, had death not ensued, the injured person could have recovered; and when he has been fully paid and satisfied for the tort by the wrong-doer in his life-time, he had, therefore, no right of action against his wrong-doer, and his legal representatives could have none.³ But there is no right of action on the part of the aggrieved party under these statutes until death actually ensues. This, in the nature of things, may be a short or

¹ Stat. 9 and 10 Vict., ch. 93, § 2.

² Stat. 27 and 28 Vict., ch. 95, § 1.

³ Read v. Great Western Ry. Co., L. R. 3 Q. B. 555. It does not appear in this case whether the party injured was an infant or not, but the presumption would seem to be that he was *sui juris*, for it seems to have

been admitted that he had the power to give an acquittance to the wrong-doer, a thing he could not do effectively had he been a minor. The New York court of appeals have announced a similar doctrine. Littlewood v. Mayor, etc., 89 N. Y. 24.

very long time after the injury is inflicted. It may be practically instantaneous, or the injured one might linger for years and at last die from the injury. In either event, the cause of action does not accrue until death takes place; and, this being true, the statute of limitations does not begin to run against the party entitled to sue until the right of action is complete. And as no action can be maintained until death takes place, the time at which the statute begins to run must be reckoned from the date of death, not from the time the injury occurred.¹

§ 550. Right of action for injury resulting in death — Rule where action is commenced in the life-time of the wrong-doer and death ensues before judgment.— These statutes, moulded after Lord Campbell's Act, which gave a right of action for the death of a person, though not authorizing a recovery against the legal representatives of the wrong-doer, are available only in the life-time of the person committing the wrong. This rule is a rigid one, and though the action to recover for the death of a child be promptly begun in the life-time of the wrong-doer, yet if he dies pending the litigation and before any judgment is rendered against him, no further proceedings can be had, and the suit must abate.² But if the wrong-doer should himself die after the aggrieved person had recovered a judgment against him for the death of his infant, there is some difficulty in determining what would be the effect of such a state of facts upon the estate of the wrong-doer. It is a familiar rule of the common law that dead persons cannot maintain nor prosecute law suits; though in perhaps all of the states general statutes are to be found authorizing the continuation of actions in the name of the legal representatives of the deceased party. But aside from a statute expressly authorizing the prosecution of an appeal by the representatives of a deceased tort-feasor, or the taking by them of an appeal, if he die after judgment and before appeal is prosecuted, there seems to be no case for a guide. What, then, is the status of a judgment against a tort-feasor who has died before an appeal is taken, or before the cause is heard in the appellate court? If no judgment can be rendered against him after death, it neces-

¹ *Andrews v. Hartford & N. H. R. R. Co.*, 84 Conn. 57.

² *Davis v. Nichols*, 54 Ark. 358, 15 S. W. Rep. 880.

sarily follows that he can take no part in the litigation, after he dies, through his legal representatives, and consequently he could not prosecute or take an appeal from a judgment against him. The appellate court, it would seem, therefore, in the absence of a statute especially authorizing it, could take no cognizance of the case. Nothing could be done, therefore, but to dismiss the appeal, which would leave the judgment below in force.

§ 551. Right to damages for death of child — Action for must be brought in life-time of wrong-doer.— At common law a right of action for an injury abated upon the death of the tort-feasor. The injury and author of the wrong were buried together, and if the redress was not had while the person committing the wrong lived, none could be had at all.¹ It is true the cause of action is made by these modern statutes to survive, but this is to the legal representatives or others expressly authorized by the statute to sue. If it did not survive no action could be maintained for an injury resulting in death, in any event, which would simply bring us back to the common-law rule. But while the cause of action thus survives, it must nevertheless be enforced in the life-time of the wrong-doer.² Nor can such an action be maintained after the death of the wrong-doer upon the theory that the injury is in fact to the next of kin, by being deprived of support or services, etc., of the person killed. The true theory of the law is, the wrong is done to the person injured, and the right of action accrues to another, not by reason of an injury to such other, but by reason of and as flowing from the wrong to the person actually and directly injured.³

§ 552. Right of parent to recover for death of child — Lord Campbell's Act — Necessary parties.— In determining who are necessary parties in actions under these statutes, the

¹ Green v. Thompson, 26 Minn. 500, 5 N. W. Rep. 376; Moe v. Smiley, 125 Pa. St. 136, 17 Atl. Rep. 228; Hererich v. Keddie, 99 N. Y. 258, 1 N. E. Rep. 787; Russell v. Sansbury, 37 Ohio St. 373; Hamilton v. Jones, 125 Ind. 176, 25 N. E. Rep. 192; Davis v. Nichols, 54 Ark. 358, 15 S. W. Rep. 880.

² Hamilton v. Jones, 125 Ind. 176, 25 N. E. Rep. 192; Moe v. Smiley, 125 Pa. St. 136, 17 Atl. Rep. 228.

³ Moe v. Smiley, 125 Pa. St. 136, 17 Atl. Rep. 228; Waller v. Chicago, 11 Ill. App. 209; Davis v. Nichols, 54 Ark. 358, 15 S. W. Rep. 880.

prudent practitioner will consult the local law in his own state, and, this done, faithfully carry out its requirements as to parties. Being an invasion of the common law, there is no right of action given by these statutes except what is plainly conferred. And when the right of action is lodged in one person or set of persons, the very persons thus named must be made parties. If more than one is authorized to sue, the action cannot be maintained by a less number.¹ And where it becomes necessary, under these statutes, to bring an action in the name of the heirs, instead of the legal representatives of the deceased, it is required that all the heirs join in the proceeding, for the remedy as pointed out must be strictly followed.² Again, where the statute permits a recovery by the legal representatives, but is silent as to the right of the heirs at law or the next of kin to sue, it can be maintained only by the legal representatives.³ And in any event it must appear that there is a person in existence who, under the statute, would be entitled to the recovery before one can be had.⁴ And where the statute provides that "a father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury to a child, and the guardian for the injury of the ward," the father alone may sue if he has not deserted his family, in which event the mother may do so. If the child be an orphan, the guardian, as such, may sue alone.⁵ And under a statute providing that the "widow, heir or personal representative" of a person killed by the fault or negligence of another may recover for such injury, the action must be brought by the widow and children or by the personal representa-

St. Louis, I. M. & S. Ry. Co. v. Needham, 52 Fed. Rep. 371, 10 U. S. App. 339, 3 C. C. A. 129.

² St. Louis, I. M. & S. Ry. Co. v. Needham, 52 Fed. Rep. 371, 10 U. S. App. 339, 3 C. C. A. 129.

³ Nash v. Toulsey, 28 Minn. 5, 8 N. W. Rep. 879; St. Louis, I. M. & S. Ry. Co. v. Needham, 52 Fed. Rep. 371, 10 U. S. App. 339, 3 C. C. A. 129; Wilson v. Bumstead, 12 Neb. 3, 10 N. W. Rep. 411; Hulbert v. City of Topeka, 34 Fed. Rep. 510; Woodward v. Railway Co., 55 Ga. 144; Books v. Danville, 95

Pa. St. 159, 166; Kramer v. Railway Co., 25 Cal. 434; Woodward v. Railway Co., 23 Wis. 404; Read v. Railway Co., L. R. 3 Q. B. 555; Andrews v. Railway Co., 34 Conn. 57. And *vide* Baird v. Citizens' Ry. Co. (Mo.), 48 S. W. Rep. 78.

⁴ Woodward v. Chicago & N. W. Ry. Co. 23 Wis. 400.

⁵ Gardner v. Kellogg, 23 Minn. 463; Buechner v. Columbia Shoe Co., 60 Minn. 477, 62 N. W. Rep. 817; Lathrop v. Shuttle, 61 Minn. 196, 63 N. W. Rep. 493.

tive of the deceased for their benefit.¹ In fact, the personal representative under this statute can exercise the right to sue only for and in behalf of the widow and children, if there be any child or children; otherwise for the widow only.² Under another clause of this statute a right of action is given to the legal representative of the person killed to the same extent which the injured one might have asserted had death not ensued; but under this provision there is no right of recovery for the killing of an infant child except for compensatory damages.³ And the damages thus recovered become part and parcel of the estate of the deceased.⁴ In cases of this kind it is usually required, where the action is prosecuted by the next of kin as authorized by statute, that the names of the plaintiff and their relationship to the deceased, as parent and child, husband and wife, etc., be stated in the complaint, to the end that the statute may be strictly complied with;⁵ nor are these statutes allowing a recovery for the death of a parent or child repugnant to or inconsistent with the fourteenth amendment to the federal constitution as depriving a child of his property by due process of law because they permit or authorize a recovery by the father for the damages to his infant. The parent simply holds the recovery in right of and as trustee for the child, and the courts have ample authority to prevent an abuse of this trust.⁶ A judgment in favor of the father thus suing in right of his child is a complete bar to an action under the statute for the same injury by the child himself.⁷ And in actions by the legal representatives for the benefit of the next of kin it is not necessary to particularly allege that the suit is brought for their benefit, where the complaint states the facts entitling the complainant, under the law, to the relief asked.⁸

¹ Cincinnati, N. O. & T. P. Ry. Co. v. Adams (Ky.), 13 S. W. Rep. 428.

² Henderson's Adm'r v. Kentucky C. R. R. Co., 86 Ky. 389, 5 S. W. Rep. 875.

³ Given's Adm'r v. Kentucky C. R. R. Co., 89 Ky. 231, 12 S. W. Rep. 257.

⁴ Given's Adm'r v. Kentucky C. R. R. Co., 89 Ky. 231, 12 S. W. Rep. 257.

⁵ Indianapolis, P. & C. R. R. Co. v. Kelley's Adm'r, 23 Ind. 133.

⁶ Hess v. Adamant Mfg. Co. (Minn.), 68 N. W. Rep. 774; Lathrop v. Schutte, 61 Minn. 196, 63 N. W. Rep. 493.

⁷ Lathrop v. Schutte, 61 Minn. 196, 63 N. W. Rep. 493.

⁸ Buechner v. Columbia Shoe Co., 60 Minn. 477, 62 N. W. Rep. 817.

§ 553. Right of action for death of child — Action by legal representatives and for damages to parent may be prosecuted in one suit.— Where these statutes confer upon the legal representatives of a deceased person a right of action for the benefit of the estate for the injury arising prior to death, and, in addition, authorize an action by such legal representatives for the benefit of the widow and children, actions for both the injury to and suffering of the person killed to the time of death, as well as for the loss to the parents by reason of the death, may be brought by such legal representatives, as the proceedings are in no sense conflicting or repugnant.¹ The actions do not depend upon each other in any sense. A recovery in one instance is not a bar to a recovery in the other right. The damages allowed in each case are upon different principles and to compensate different injuries. “One is for the loss sustained by the estate and because of the suffering of the person injured because of the personal injury in his life-time. The recovery which goes to the benefit of the creditors of the decedent, if any there be, is such as arises from the nature of the injury; the other takes no account of the wrongs done to the decedent, but is for the pecuniary loss to the next of kin occasioned by the death alone.”² But in actions for the next of kin exclusively, no account of any injury to the estate of the decedent can be taken into consideration.³

§ 554. Lord Campbell’s Act — Actions to recover for injury to infants — Proof of service.—Where an infant is living with his parents, whether he be able to perform any valuable domestic service or not, the parent may recover under the statutes authorizing a recovery for the damages resulting in the death of a child. The law presumes some services in all such instances. If the child be too young to work, the parent nev-

¹ Needham v. Railway Co., 38 Vt. 294; South & North Ala. R. R. Co. v. Donovan, 84 Ala. 14, 4 S. Rep. 142; McNamara v. Logan, 100 Ala. 187, 14 S. Rep. 175; Vicksburg & M. Ry. Co. v. Phillipps, 64 Miss. 693, 2 S. Rep. 537; Fordyce v. McCants, 51 Ark. 509, 11 S. W. Rep. 694; Pratt Coal & Iron Co. v. Brawley, 83 Ala. 371, 3 S. Rep. 555.

² Davis v. Railway Co., 53 Ark. 117, 13 S. W. Rep. 801; Vicksburg & M. R. Co. v. Phillipps, 64 Miss. 693, 2 S. Rep. 537; Pratt Coal & Iron Co. v. Brawley, 83 Ala. 371, 3 S. Rep. 555.

³ Needham v. Grand Trunk Ry. Co., 38 Vt. 294; Blake v. Midland Ry. Co., 10 E. L. & Eq. 437; Whitford v. Panama R. R. Co., 23 N. Y. 465.

ertheless has the right to any services he may be able to render at any time before attaining his majority.¹ Damages under these statutes may also be recovered by the parent for an injury to his child, though he be of age. But before a recovery can be had in such cases it is necessary to show that the child had been assisting his parent materially before his death, and that there was a reasonable expectation from the facts in evidence that substantial assistance would have been kept up had not death intervened. Otherwise the amount of recovery cannot exceed nominal damages.² It is not necessary in order to maintain such an action for the value of the services of or support from an adult child to show the precise amount of injury sustained from the standpoint of a money value; though of course such facts must be made to appear as will authorize the conclusion that some pecuniary damage has resulted from the fact of the third party causing death to the child.³ That the complaint shows that the child killed has passed the age of majority when the injury or death occurred does not render it demurrable; it is incumbent on the defense to set up facts denying the right of the parties suing for injury to an adult child by way of answer.⁴ Generally, however, the pecuniary damage recoverable by the parents of an adult child for an injury arising by reason of his death by the wrongful act of another is confined to cases where the parents are poor and helpless and require support at the hands of the grown child. If they are well able to take care of themselves without the assistance of the child, they have no right to recover damages for his death.⁵ The poverty of the parent may be taken into consideration in cases of this kind for the purpose of showing that the services of the child would probably be needed in assisting them at an earlier age than would be the case were

¹ *Robel v. Chicago, M. & St. P. Ry. Co.*, 35 Minn. 84, 27 N. W. Rep. 305. 425, 25 N. W. Rep. 223; *Barley v. Chicago & A. R. R. Co.*, 4 Biss. (U. S. C. C.)

² *Fordyce v. McCants*, 51 Ark. 509, 11 S. W. Rep. 694; *Robel v. Chicago, M. & St. P. Ry. Co.*, 35 Minn. 84, 27 N. W. Rep. 305; *Regan v. Chicago, M. & St. P. Ry. Co.*, 51 Wis. 599, 8 N. W. Rep. 292; *Pennsylvania R. R. Co. v. Keller*, 67 Pa. St. 300. See, too, in illustration of the principle, *Johnson v. Chicago & N. W. Ry. Co.*, 64 Wis. 430; *Chicago v. Powers*, 42 Ill. App. 169.

³ *Pennsylvania R. R. Co. v. Kelier*, 67 Pa. St. 300.

⁴ *Houston & T. C. R. R. Co. v. Cowser*, 47 Tex. 293.

⁵ *Potter v. Chicago & N. W. Ry. Co.*, 21 Wis. 377.

v. Chicago & N. W. Ry. Co., 64 Wis.

the parents able to give the child his time at school or in training for some useful vocation in after life.¹ The bad health of the parent may likewise be taken into consideration for the same purpose.²

§ 555. Right of child to recover for death of parent—Lord Campbell's Act—Elements of damage.—Within the term "widow and next of kin" is included the right of the child to recover for the pecuniary loss he suffers as a consequence of the death of his parents by the wrong of another. The child, therefore, is entitled to recover, as an element of damage, for the benefit he would have received during the period of the parent's expectancy of life, and this pecuniary benefit may be shown by evidence that the parent was "a careful, painstaking, industrious, temperate and trustworthy man of good business qualifications," and these facts may be taken into consideration in arriving at the value of the training and instruction which the parent would have probably given his child, as well as other probable pecuniary advantages naturally and fairly deducible from the legitimate facts and circumstances of the case.³ But in an action under these statutes for damages accruing to the widow and children, there can be no recovery for damages sustained by the widow where she dies before suit is brought or if she dies before trial. And in such cases the recovery is confined to the injury the children have suffered, and the evidence of any injury to the deceased widow would be vulnerable to objection because irrelevant.⁴ Where a child is killed it is competent to show in evidence that the parents were poor, in feeble health, and that the child was their

¹ *Barley v. Chicago & A. R. R. Co.*, 4 Biss. (U. S. C. C.) 430; *Chicago v. Powers*, 42 Ill. 169. *S. W. Rep.* 389; *Mansfield Coal Co. v. McEnnery*, 91 Pa. St. 185; *St. Lawrence R. Co. v. Lett*, 11 Canada, 422;

² *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 613. *Searle v. Railway Co.*, 32 W. Va. 370, 9 S. E. Rep. 248; *Illinois Central R. Co. v. Weldon*, 52 Ill. 290; *Castello v. Landwehr*, 28 Wis. 522; *Dimmey v. Railroad Co.*, 27 W. Va. 32, 57;

³ *Taylor v. Western Pac. R. R. Co.*, 45 Cal. 323; *McIntyre v. New York Cent. R. R. Co.*, 37 N. Y. 287; *Board v. Legg*, 93 Ind. 523; *Baltimore & O. Ry. Co. v. Wightman*, 29 Gratt. (Va.) 431; *Tilley v. Hudson River R. Co.*, 24 N. Y. 471; *Pennsylvania R. Co. v. Goodman*, 62 Pa. St. 329; *Stoher v. Railway Co.*, 91 Mo. 509, 4

⁴ *Taylor v. Western Pac. R. R. Co.*, 45 Cal. 323; *David v. Southern R. R. Co.*, 41 Ga. 223.

main or only support, as the case may be. His expectancy may also be shown, as well as all other facts showing a direct and consequential injury by reason of the wrong.¹

§ 556. Right of parent to recover for death of child — Measure of damages.— There is no mathematical rule by which the jury or court are to be guided in estimating the amount of damages which a parent is entitled to recover under statutes authorizing actions for damages for the death of a child. Ordinary common sense, impartial consideration of all the facts of the whole case in all its phases, and the experience, observation and conservative judgment of the court or jury trying the case, should be the guide in arriving at a conclusion. No set form or rule for computation can be formulated.² The recovery in all cases, of course, must be confined to pecuniary loss.³ But while this is true, it is not necessary to prove by direct evidence that the parent has lost the services of his child. If the age of the child be such as to entitle the parent to such services and he has not been emancipated, the law fixes the

¹ *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 613.

² *Chicago v. Major*, 18 Ill. 349, 359; *Railroad Co. v. Kindred*, 57 Tex. 293, 304; *Potter v. Railroad Co.*, 21 Wis. 347; *Brunswig v. White*, 70 Tex. 504, 8 S. W. Rep. 85; *St. Louis, I. M. & S. Ry. Co. v. Sweet*, 60 Ark. 550, 31 S. W. Rep. 571; *Baltimore & O. R. R. Co. v. Wightman*, 29 Gratt. (Va.) 431; *Central R. R. Co. v. Rouse*, 77 Ga. 393; *Mansfield v. McEnery*, 91 Pa. St. 185; *Pennsylvania R. R. Co. v. McClosky*, 23 Pa. St. 526; *St. Louis, I. M. & S. Ry. Co. v. Maddry*, 57 Ark. 306, 21 S. W. Rep. 742; *Pennsylvania R. R. Co. v. Butler*, 57 Pa. St. 335; *Robel v. Chicago, St. P. & M. Ry. Co.*, 35 Minn. 84, 27 N. W. Rep. 305; *Shaber v. St. Paul, M. & M. Ry. Co.*, 28 Minn. 103, 9 N. W. Rep. 575; *Scheffler v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 518, 19 N. W. Rep. 656; *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. Rep. 575; *McIntyre v. Railroad Co.*, 37 N. Y. 297; *Chicago v. Hesing*, 83 Ill. 204.

³ *Potter v. Railroad Co.*, 21 Wis. 374; *Chicago v. Major*, 18 Ill. 359; *Regan v. Chicago, M. & St. P. Ry. Co.*, 51 Wis. 599, 8 N. W. Rep. 292; *Chicago v. Hesing*, 83 Ill. 207; *McIntyre v. New York Cent. R. R. Co.*, 37 N. Y. 287; *Illinois Cent. R. R. Co. v. Crudup*, 63 Miss. 291; *Railroad Co. v. Becker*, 84 Ill. 486; *Railroad Co. v. Shannon*, 43 Ill. 338; *Barley v. Chicago & A. R. R. Co.*, 4 Biss. (U. S. C. C.) 430; *Brunswig v. White*, 70 Tex. 504, 8 S. W. Rep. 85; *St. Louis, I. M. & S. Ry. Co. v. Sweet*, 60 Ark. 550, 31 S. W. Rep. 571; *Paulmier v. Erie Ry. Co.*, 34 N. J. Law, 151; *St. Louis, I. M. & S. Ry. Co. v. Maddry*, 57 Ark. 306, 21 S. W. Rep. 472; *Searle v. Kanawha & O. Ry. Co.*, 32 W. Va. 370, 9 S. E. Rep. 248; *Tilley v. Railroad Co.*, 29 N. Y. 252; *Pennsylvania R. R. Co. v. Butler*, 57 Pa. St. 335; *Whitney v. Hitchcock*, 4 Denio, 461; *Morris v. Chicago, M. & St. P. R. R. Co.*, 26 Fed. Rep. 22; *Ewen v. C. & N. W. Ry. Co.*, 38 Wis. 613, 623.

parent's right to the same, and direct proof of such right is not required.¹ But the complaint must show by necessary inference, or otherwise, some injury to the party suing,² and this necessary inference is not established from the mere allegation of the killing.³

§ 557. Right of parent to recover for death of child — Lord Campbell's Act — Conflict of laws.— Whether an administrator, suing for the benefit of the widow and next of kin, within which latter term, of course, may be included the parent or father, may bring an action in one state under these statutes permitting a recovery for death, is a question of some difficulty — an embarrassment which the courts seem to have manifestly felt, judging from the conflicting decisions. One class of cases maintains that an administrator of a foreign state cannot sue at all for such an injury in any other state than that in which he was appointed.⁴ Other authorities, somewhat upon the same line, admit that such an administrator may sue in the foreign jurisdiction under a foreign law, where the laws of both jurisdictions permit an administrator to sue for the death of a person.⁵ And when this is permitted, the action may be brought and maintained by the local administrator without showing that administration has been granted in the state or country where the injury was inflicted.⁶ Among the grounds upon

¹ *Chicago v. Hesing*, 83 Ill. 204, 207; *Regan v. Chicago, M. & St. P. Ry. Co.*, 51 Wis. 599, 8 N. W. Rep. 292; *Kelley v. Chicago, M. & St. P. Ry. Co.*, 50 Wis. 381, 7 N. W. Rep. 291.

² *Regan v. Chicago, M. & St. P. Ry. Co.*, 51 Wis. 599, 8 N. W. Rep. 292.

³ *Regan v. Chicago, M. & St. P. Ry. Co.*, 51 Wis. 599, 8 N. W. Rep. 292.

⁴ *Limekiller v. Hannibal & St. J. R. R. Co.*, 33 Kan. 83, 5 Pac. Rep. 401; *Hulbert v. City of Topeka*, 34 Fed. Rep. 510; *Vawter v. Railway Co.*, 84 Mo. 679; *Woodworth v. Michigan, S. & N. I. R. R. Co.*, 10 Ohio St. 121; *McCarthy v. Chicago, I. L. & Pac. R. R. Co.*, 18 Kan. 46.

⁵ *Needham v. Grand Trunk Ry. Co.*, 38 Vt. 294; *Leonard v. Columbia*

Steam Nav. Co., 84 N. Y. 48; *Stewart v. Baltimore & O. R. R. Co.*, 18 Sup. Ct. Rep. 105; *Railway Co. v. Cutter*, 16 Kan. 568; *Perry v. Railway Co.*, 29 Kan. 420; *Limekiller v. Hannibal & St. J. R. R. Co.*, 33 Kan. 83, 5 Pac. Rep. 401; *Hulbert v. City of Topeka*, 34 Fed. Rep. 510; *Andrews v. Railroad Co.*, 34 Conn. 57; *Railroad Co. v. Crudup*, 63 Miss. 291. The contention made by this line of authorities is admirably sustained in a very learned and able opinion by Woods, C. J., in the recent case of *Pullman Palace Car Co. v. Lawrence (Miss.)*, 22 S. Rep. 53.

⁶ *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48.

which many of the most learned courts base the right to sue in a foreign state is the necessity of things. It is partly to prevent a failure of justice, by the wrong-doer leaving the jurisdiction where the injury took place and thereby placing the law at defiance. And certainly the reason of the rule permitting an action in a foreign state, where service can be had, is as forcible where the right has to be enforced in the name of an administrator as where it can be done by the party injured *in propria persona*.¹ But there are authorities which maintain that these statutes have no extraterritorial force or effect whatever, and that no action under them can be maintained unless in the courts of the state permitting the same, and where the injury actually takes place.² It is not believed, however, that this holding is in harmony with either the pronounced weight of authority or the better and more substantial reasoning. It is maintained by many other courts of the greatest dignity and learning that the right of action in cases of this kind does not depend upon whether it arises under the statute or the common law; that if the right of action becomes fixed and a legal liability accrues under the statute law of a state, such action is transitory in its character, and the liability thus incurred follows the parties wherever they may go, and may be enforced in the courts of any state having jurisdiction of the parties and the subject-matter.³

¹ The following cases will be found to illustrate this rule of law: Northern Pac. R. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. Rep. 978; Atchison, T. & S. F. R. R. Co. v. Worley (Tex. Civ. App.), 25 S. W. Rep. 478; Evey v. Mexican Cent. Ry. Co., 81 Fed. Rep. 294; Brockway v. American Express Co. (Mass.), 47 N. E. Rep. 87; Herrick v. Railroad Co., 31 Minn. 11, 16 N. W. Rep. 413; Dennick v. Railroad Co. 103 U. S. 11.

² Anderson v. Railroad Co., 37 Wis. 321; Woodward v. Railroad Co., 10 Ohio St. 121; Whitford v. Railroad Co., 23 N. Y. 465; Hover v. Pennsylvania R. R. Co., 25 Ohio St. 667; Taylor's Adm'r v. Pennsylvania R. R. Co., 78 Ky. 348; Mackay v. Railroad Co., 14 Blatchf. 65; State v. Railroad Co.,

45 Md. 41; McCarthy v. Chicago, R. L. & Pac. R. R. Co., 18 Kan. 46.

³ Hamilton v. Hannibal & St. Joe R. R. Co., 39 Kan. 53, 18 Pac. Rep. 57; Eingartner v. Illinois Steel Co., 94 Wis. 70, 68 N. W. Rep. 664; McLeod v. Railroad Co., 58 Vt. 727, 6 Atl. Rep. 648; Rafael v. Verelst, 2 W. Bl. 1055; Cady v. Sanford, 53 Vt. 632; Herrick v. Minneapolis & St. L. Ry. Co., 31 Minn. 11, 16 N. W. Rep. 413; Railroad Co. v. Wallace, 50 Miss. 244; Knight v. Railroad Co., 108 Pa. St. 250; Leonard v. Steam Nav. Co., 84 N. Y. 48; Chicago, St. L. & N. O. Ry. Co. v. Doyle, 60 Miss. 977; Nashville & C. R. Co. v. Sprayberry, 8 Baxt. (Tenn.) 341; Selma, R. & D. R. Co. v. Lacy, 43 Ga. 461; Boyce v. Railway Co., 63 Iowa, 70, 18 N. W. Rep. 673; Burns v.

In an action in New York for an injury arising under a New Jersey statute it was stoutly contended that, as the cause of action arose under the statute of New Jersey, the law could have no extraterritorial force, and could not, therefore, be enforced in New York. In answer to this proposition, the supreme court of the United States, speaking through Mr. Justice Miller, used this effective language: "We do not see how the fact that it was a statutory right can vary the principle. If the defendant was legally liable in New Jersey, he could not escape that liability by going to New York. If the liability to pay money was fixed by the law of the state where the transaction occurred, is it to be said it can be enforced nowhere else because it depends upon the statute law and not upon the common law? It would be a very dangerous doctrine to establish, that, in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred."¹ The better authority seems clearly to be in harmony with the doctrine announced by the highest federal court. And the mere fact that the laws of one state are different from those of another do not make them contrary to the policy of a different state unless positively repugnant to the laws of such state; and a parent may, therefore, generally speaking, recover for the death of his child which took place in a distant state, where he can get proper service on the defendant and where the laws of the state where the injury occurred permit such a recovery. But when the remedy is sought to be enforced under the statutes of a foreign state, it is always necessary to show that an action could be maintained in the state whose laws are relied upon to support a right of recovery. If such proof of the foreign law is not made, an action based thereon must fail.² In determining the rights of the parties

Grand Rapids & I. R. R. Co., 113 Ind. 508; Toledo, W. & W. Ry. Co. v. Milligan, 52 Ind. 505.
 169, 15 N. E. Rep. 230; Selma, Rome & D. R. R. Co. v. Lacy, 49 Ga. 105;
 Railroad Co. v. Swint, 73 Ga. 651; U. S. 11; Railroad Co. v. Miller, 19
 Railroad Co. v. Nix, 68 Ga. 572; Railroad Co. v. Crudup, 63 Miss. 291; Mich. 305; Pickering v. Fisk, 6 Vt. 102.
 Smith v. Bull, 17 Wend. 323; Hannibal & St. J. R. R. Co. v. Maloney, 42 Mo. 467; Mason v. Warner, 31 Mo. 508; Chicago, St. L. & N. O. R. R. Co. v. Doyle, 60 Miss. 977; Hamilton v. Hannibal & St. J. R. R. Co., 39 Kan.

under such foreign law, the courts of the state where the action is pending will usually give the same construction to the foreign statute placed upon it by the highest court of such state, if there has been no construction of a similar statute in the jurisdiction of the forum.¹ The courts do not take judicial notice of the statutes of other states, and a right of action in a parent to recover for the death of a child, or *vice versa*, when depending upon a foreign law, must be supported by affirmative proof of that law.²

§ 558. Recovery for death of child — Limit — Expectancy.

As the law recognizes the assistance which a parent may reasonably expect to receive from his child, when killed, if he had lived, as the proper measure of the recovery for his death, it follows that the limit of recovery cannot extend beyond such time as the parent would have lived to enjoy it. The rule, therefore, is, the parent has a right of recovery for such reasonable support and services as the evidence shows he could properly have expected of and from the child to such a time as the parent would live, and no longer. No recovery can be had for services of a prospective nature which would necessarily be rendered at the end of the period of expectancy of the parent.³ But in actions of this kind the jury trying the case may take into consideration the reasonable probability of pecuniary assistance from the child to the parent, even beyond the majority of the child, where this would not be beyond the period of the life expectancy of the parent.⁴

§ 559. Right of recovery for death — Mental suffering, loss of society, etc., as elements of damage.— As there can be no recovery under the statutes allowing a recovery for death for vindictive or punitive damages,⁵ and as the right of re-

56, 18 Pac. Rep. 57; McLeod v. Connecticut & P. R. Co., 58 Vt. 727, 6 Atl. Rep. 648; Selma, R. & D. R. R. Co. v. Lacy, 43 Ga. 461; Selma, R. & D. R. R. Co. v. Lacy, 49 Ga. 106.

¹ Hamilton v. Hannibal & St. J. R. R. Co., 39 Kan. 56, 18 Pac. Rep. 57.

² Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48.

³ Fordyce v. McCants, 51 Ark. 509, 11 S. W. Rep. 694.

⁴ Johnson v. Chicago & N. W. R. R. Co., 64 Wis. 425, 25 N. W. Rep. 223.

⁵ Shaber v. St. Paul, M. & M. Ry. Co., 28 Minn. 103, 9 N. W. Rep. 575; Robel v. Chicago, M. & St. P. Ry. Co., 35 Minn. 84, 27 N. W. Rep. 305.

covery is restricted to such pecuniary damages as naturally and proximately flow from the wrong, it follows that there can be no recovery, in the absence of a statute authorizing it, for injury to the feelings or loss of the society and comfort of the one killed.¹

§ 560. Recovery for death—Statute of limitations.—Where the statute authorizing a recovery for the death of a parent or child and the right to sue is lodged in an executor or administrator, it is clear, under the familiar elementary rule, that the statute of limitations cannot be put in motion until there is a right to sue. And as it is equally clear that the authority to sue is in the executor or administrator when lodged in these representatives to the exclusion of others by law, it must necessarily follow that the statute of limitations cannot begin to run until such executor or administrator, as the case may be, has come into existence by due course of law. The right to recover, then, takes effect not when the injury causing the death occurs, but when the legal representative becomes vested with power and authority as such under the law.²

¹ Illinois Cent. R. R. Co. v. Weldon, Wend. 429; Blake v. Midland Ry. Co., 52 Ill. 290; Shaber v. St. Paul, M. & N. Ry. Co., 28 Minn. 103, 9 N. W. Rep. 575; Pennsylvania R. R. Co. v. Kelly, 31 Pa. St. 372; Cowden v. Wright, 24 10 E. L. & Eq. 407. ² Andrews v. Hartford & N. H. R. Co., 34 Conn. 57.

CHAPTER VII.

CUSTODY OF CHILDREN.

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| <p>§ 561. The father generally has the right to the custody of his infant child.</p> <p>562. The welfare of the child controls under the modern rule.</p> <p>563. Rights of charitable institutions to custody.</p> <p>564. Power of parent to renounce his right of custody.</p> <p>565. Who entitled to custody when child very young.</p> <p>566. Conflicting claims of parents.</p> <p>567. Conflicting claims of parents and third persons.</p> <p>568. Poverty of parents with reference to right of custody.</p> <p>569. Who entitled to custody of bastards.</p> <p>570. Right of third persons to custody.</p> | <p>§ 571. Right of child to select guardian of person.</p> <p>572. Right of father to bind his child as apprentice, and effect on right of custody.</p> <p>573. Courts usually given discretion in awarding custody.</p> <p>574. What courts have jurisdiction to award custody.</p> <p>575. Rights of parents upon decree of divorce.</p> <p>576. Right of parent when child detained by authority of law.</p> <p>577. Right of guardians to custody of ward.</p> <p>578. Decision of court awarding custody binding on parties.</p> |
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§ 561. **Rights of father.**—At common law, and generally when not changed by statute, the father is regarded in law as the natural guardian of his infant child. He is the head of the family. To him both the mother and child have the right to look for support, for the comforts of life within his means, and maintainance generally. Being thus burdened with the care, education and support of the infant, the law gives him the right, in return, to the earnings, services and work of the child during minority. The necessities of the case, therefore, require that he be deemed the proper parent to have the custody and control of the person of his infant child, and, as a rule, when he is not an unfit person for this sacred trust, the law gives him the preference over all others in the matter of the custody of

his children.¹ This right of custody in the father has been held to exist though the infant be at the breast,² and though there be a valid agreement of separation between the father and mother, and the child be of tender years.³ Having this paramount right to the custody of his infant children, the father may take them from any person detaining them by writ of *habeas corpus*, even from the possession of the mother if they be old enough to be transferred to the custody of the father without danger to their health or life.⁴ The right of the father to the custody of his infant child accrues, generally speaking, as soon as it can be safely taken from the mother.⁵ And if it were not for the right in the father to the custody of his children, he would be necessarily hampered and embarrassed in discharging the duties of the parent head of the family, both to the issue of the marriage and to the wife and mother. If the mother could take and keep them from the father, he could not as well see to their education, support and welfare generally.⁶ But while the father usually has the right to the custody of his infant child, this right is one which may be forfeited and lost. And when-

¹ 2 Kent, Comm. 198; Wood v. Wood, 3 Ala. 756, 761; Bell v. Hallenbeck, Wright (Ohio), 751; State v. Reuff, 29 W. Va. 751, 2 S. E. Rep. 801; Bonney v. Bonney (Ky.), 3 S. W. Rep. 171; McBride v. McBride, 1 Bush (Ky.), 15; In re Hunt, 103 Cal. 355, 37 Pac. Rep. 206; Tuggle v. Tuggle (Ga.), 25 S. E. Rep. 489; Mercein v. Barry, 25 Wend. 64, 72; People ex rel. Nickerson, 19 Wend. 16; Rex v. Johnson, 1 Str. 519; Rex v. Delavel, 3 Burr. 1484; People ex rel. Ordonaux v. Chegaray, 18 Wend. 630; Rex v. De Manneville, 5 East, 221; State ex rel. Paine v. Paine, 4 Humph. (Tenn.) 523; Cocke v. Hannum, 39 Miss. 423; Johnson v. Terry, 34 Conn. 259, 263; Ex parte Hopkins, 3 P. Wms. 152; People v. Mercein, 3 Hill (N. Y.), 399; In re Reynolds, 8 N. Y. S. 172; Weir v. Marley, 99 Mo. 484, 12 S. W. Rep. 798; Miller v. Wallace, 76 Ga. 479; Green v. Campbell, 85 W. Va. 698, 14 S. E. Rep. 202; Rust v. Varvacter, 9 W. Va.

600; State v. Baldwin, 5 N. J. Eq. 454; State v. Nachtwey, 43 Iowa, 653; State v. Smith, 6 Greenl. 462; Regina v. Smith, 16 E. L. & Eq. 221; Johnston v. Johnston, 89 Wis. 416, 62 N. W. Rep. 181; Schiltz v. Roenitz, 86 Wis. 37, 56 N. W. Rep. 194; 2 Kent, Comm. 205; Latham v. Ellis, 116 N. C. 30, 20 S. E. Rep. 1012; Harris v. Harris, 115 N. C. 587, 20 S. E. Rep. 187; Bowles v. Dixon, 32 Ark. 92; Draper v. Draper, 68 Ill. 17; Lusk v. Lusk, 28 Mo. 91; Dailey v. Dailey, Wright (Ohio), 514; Franklin v. Carswell (Ga.), 29 S. E. Rep. 476.

² King v. De Manneville, 5 East, 221.

³ People v. Mercein, 3 Hill (N. Y.), 399.

⁴ Rawlyns v. Vandyke, 3 Esp. 250; Day v. Day, 24 N. Y. S. 873.

⁵ Hunt v. Hunt, 4 Greene (Iowa), 216.

⁶ People ex rel. Barry v. Mercein, 3 Hill (N. Y.), 399, 405, 406.

ever the conduct of the father makes him an unfit subject for the care and consideration which the child should always have at his hands, and the interests and welfare of the child for this reason require that it be taken from the custody of the father, he will lose his right of control over the child; for he cannot abandon it to neglect, treat it with such cruelty in any way as to seriously impair its health, or in any other manner so mistreat it as to make it best for the child to be placed elsewhere. Without demeaning himself in a manner worthy of the responsible trust, he is not in an attitude to insist on his legal right to the care of the child.¹ Nor is it sufficient to entitle a father to retake a child which has been removed from his custody that he merely promise to reform his conduct. He must first reform in good faith and in fact, before such a request will be entertained by the courts.² This right of the father to the custody of his infant is for the benefit of the child rather than that of the father. It is conferred by law upon the father because he is the head of the family, is liable for its care and support, and it is presumed that these and other like considerations, as well as the natural affection for the child which is instilled by nature in the breast of the parent, are sufficient to make the father the most fit person to have its custody.³ When by reason of his misconduct the father forfeits his right to the control of the person of his child, the paramount right to its custody becomes at once vested in the mother by operation of law as the next most fit person to be intrusted therewith.⁴

§ 562. Rights of parents — Welfare of the child — Modern rule.— Whatever may have been the stern rule of the common law, that the father is always to be regarded as the proper parent for the care, custody and control of his infant children, the modern rule looks more to the fitness of things and the inter-

¹ Verser v. Ford, 37 Ark. 29; Green v. Campbell, 35 W. Va. 698, 14 S. E. Rep. 212; Washaw v. Gimble, 50 Ark. 351, 7 S. W. Rep. 389; Bryan v. Lyon, 104 Ind. 227, 3 N. E. Rep. 880; Schroeder v. Filbert, 41 Neb. 475, 60 N. W. Rep. 89; Nugent v. Powell (Wyo.), 33 Pac. Rep. 23; Johnston v. Johnston, 89 Wis. 416, 62 N. W. Rep. 181; State v. Grisby, 38 Ark. 406.

² Lally v. Sullivan, 85 Iowa, 49, 51 N. W. Rep. 1155.

³ Schroeder v. Filbert, 41 Neb. 745, 60 N. W. Rep. 891.

⁴ Nugent v. Powell (Wyo.), 33 Pac. Rep. 213. See also Johnston v. Johnston, 89 Wis. 416, 62 N. W. Rep. 181.

est of the child, and seems to have encroached, perhaps imperceptibly, upon the ancient and rigid idea of the universal fitness of the father for the control of his children. Neither the wishes nor welfare of either parent will be regarded in determining to whom shall be awarded the custody of an infant; but the courts will take command of the situation, and, with all the facts and circumstances of the case before them, will exercise a sound discretion in behalf of the child itself, and whatever the interest and welfare of the child seems to dictate will be obeyed. This interest and welfare is by the trend of all the modern decisions regarded as the controlling issue.¹

§ 563. Rights of charitable institutions and private persons who take the infant to raise.—When the mother of an

¹ State ex rel. Flint v. Flint (Minn.), 65 N. W. Rep. 272; In re Hope (R. I.), 34 Atl. Rep. 994; Tuggle v. Tuggle, 25 N. E. Rep. 489; Miller v. Miller (Fla.), 20 S. Rep. 989; Shaw v. Natchway, 43 Iowa, 653; Washaw v. Gimble, 50 Ark. 351, 5 S. W. Rep. 389; State v. Noble, 70 Iowa, 174, 30 N. W. Rep. 396; Sturtevant v. State, 15 Neb. 459, 19 N. W. Rep. 617; Gishwiler v. Dodez, 4 Ohio St. 617; Commonwealth v. Keagy, 1 Ashm. (Pa.) 248; United States v. Green, 3 Mason, 482; In re Waldron, 13 Johns. 419; Fonts v. Pierce, 64 Iowa, 71, 19 N. W. Rep. 854; Bonnett v. Bonnett, 61 Iowa, 199, 19 N. W. Rep. 91; Jones v. Darnall, 103 Ind. 569, 2 N. E. Rep. 229; Joab v. Sheets, 99 Ind. 328; Farnham v. Pierce, 141 Mass. 203, 6 N. E. Rep. 830; State v. Reuff, 29 W. Va. 751, 2 S. E. Rep. 801; Bonney v. Bonney (Ky.), 3 S. W. Rep. 171; Waring v. Waring, 100 N. Y. 570, 3 N. E. Rep. 289; Lyle v. Lyle, 86 Tenn. 372, 6 S. W. Rep. 878; Bryan v. Lyon, 103 Ind. 227, 3 N. E. Rep. 880; Williams v. Williams, 23 Fla. 324, 2 S. Rep. 768; People v. Allen, 105 N. Y. 628, 11 N. E. Rep. 143; In re Stockman, 71 Mich. 180, 38 N. W. Rep. 876; Schroeder v. Filbert, 41 Neb. 745, 60 N. W. Rep. 89; Clark v. Boyer, 32 Ohio St. 310; Brown v. Nugent (Wyo.), 33 Pac. Rep. 23; Harris v. Harris, 115 N. C. 587, 20 S. E. Rep. 187; In re Brown's Estate, 166 Pa. St. 249, 30 Atl. Rep. 1122; Legate v. Legate, 87 Tex. 248, 28 S. W. Rep. 281; In re Snook, 54 Kan. 219, 38 Pac. Rep. 272; Verner v. Ford, 37 Ark. 27; Richards v. Collins, 45 N. J. Eq. 283, 17 Atl. Rep. 831; In re Beckwith, 48 Kan. 159, 23 Pac. Rep. 164; In re Lundergan, 8 N. Y. S. 924; Coffee v. Black, 82 Va. 567; In re Woman's North Pacific Presbyterian Board of Missions, 18 Oreg. 339, 22 Pac. Rep. 1105; Giles v. Giles, 30 Neb. 624, 47 N. W. Rep. 916; In re Bart, 25 Kan. 310; In re Bush, 47 Kan. 264, 27 Pac. Rep. 1003; Green v. Campbell, 35 W. Va. 698, 14 S. E. Rep. 212; Cunningham v. Barnes, 37 W. Va. 46, 17 S. E. Rep. 308; Marshall v. Reams, 32 Fla. 499, 14 S. Rep. 95; Slater v. Slater, 90 Va. 845, 20 S. E. Rep. 780; State v. Libbey, 44 N. H. 321; In re Scarritt, 76 Mo. 565; Norris v. Norris (Tex. Civ. App.), 46 S. W. Rep. 405; English v. English, 32 N. J. Eq. 738, 743; United States v. Sanvage, 91 Fed. Rep. 490.

infant dies before it has arrived at an age at which it could be raised without the care of a mother or some one occupying the position of mother to it, such infants are frequently consigned to the care of some charitable institution to be reared, and this right of custody will be paramount to that of the father when and to the extent that it is necessary for the best interests of the child. Sometimes it is committed to charitably disposed families for the same purpose. When this is done, there naturally springs up a mutual affection and attachment between the child and its new parents very much akin to that between natural parents and children. The question of the right of custody of the father sometimes comes up where he seeks, after the child has thus been cared for for several years, to regain the control of its person. And whenever this is the case, the courts look to the welfare of the child in determining the rights of the contending parties. Where a minor child of a deceased Indian soldier was placed in an institution which provided a home for destitute orphans, upon a written agreement signed by the mother whereby she surrendered the "care and guardianship" of such child, to be cared for as the trustees might see fit, but no time being specified, it was held that the mother's right to the custody of the child was not thereby lost, and that it could be asserted at any time during minority.¹ But where the state maintains permanent homes for destitute and neglected children until they arrive at a certain age, and the parents surrender their children to such institution to be cared for by the state as *parens patriæ*, the control of such institution then becomes paramount to the right of the parent to retake it until it reaches such age.² Where an infant is too young to be properly cared for by the father, and it is placed with a family to be raised where mutual affections spring up, the courts will not permit it to be suddenly taken from its foster parents by the father; but the custodian of such child will always be required to give every opportunity to the father that he may see and cultivate the love and affection of his child, and that, when the attachment between parent and child

¹ Wishard v. Medaris, 34 Ind. 168. See also Nebraska Children's Home Soc. v. State (Neb.), 78 N. W. Rep. 267.

² Whalen v. Olmstead, 61 Conn. 263, 23 Atl. Rep. 964. See also Van Walters v. Board of Children's Guardians, 132 Ind. 567, 32 N. E. Rep. 568.

becomes mutual by this cultivation, the courts will then, and not before, require the child to be surrendered up to the father and natural guardian.¹

§ 564. Right of parent to release.—As a general rule it is contrary to the policy of the law to permit a parent to delegate or release his authority to control the person of his child during minority, unless, of course, it be to apprentice him as provided by law, or in a case of similar circumstances. The duty which the law enjoins upon the parent to support, educate and care for his child cannot be performed where the parent sends the child away and turns the care of him over to another. And this being true, the law will not tolerate such an attempted release of authority.² If a parent has surrendered the right to the custody of his child to another, he may revoke it at pleasure, as it is not binding upon him.³ The same rule obtains as to the mother's rights over her bastard child. The mother of a bastard stands in the place of a father in this respect to her bastard.⁴ But in a decree of divorce, where no valid marriage has been shown and the custody of the child is awarded to the supposed father, where the mother is properly in court and consents to the decree, the right of such supposed father to the custody of the bastard

¹ Washaw v. Gimble, 50 Ark. 351, 7 S. W. Rep. 389. See, too, as holding to practically the same doctrine, Sturtevant v. State, 15 Neb. 459, 19 N. W. Rep. 617; Bonnett v. Bonnett, 61 Iowa, 199, 16 N. W. Rep. 96.

² In the Matter of Scarritt, 76 Mo. 565; State v. Libbey, 44 N. H. 321; Chapsky v. Wood, 26 Kan. 650; Bel-ler v. Jones, 22 Ark. 92; State v. Clover, 1 Harr. (N. J.) 419; Copeland v. State, 60 Ind. 394; Washaw v. Gimble, 50 Ark. 351, 7 S. W. Rep. 389; Weir v. Marley, 79 Mo. 484, 12 S. W. Rep. 789; Queen v. Smith, 6 E. L. & Eq. 221; Moore v. Christian, 56 Miss. 408; Lee v. Back, 30 Ind. 148; McKenzie v. State, 80 Ind. 547; Jenness v. Emerson, 15 N. H. 486; People v. Mercein, 3 Hill (N. Y.) 399; Dalton v. State, 6 Blackf. (Ind.) 357; Wish-

ard v. Medaris, 34 Ind. 168; State v. Baldwin, 5 N. J. Eq. 454; State v. Banks, 25 Ind. 495; Copeland v. State, 60 Ind. 394; Johns v. Emmert, 62 Ind. 533; State v. Reuff, 29 W. Va. 751, 2 S. E. Rep. 801; Brook v. Logan, 112 Ind. 183, 13 N. E. Rep. 669; Drum v. Keen, 47 Iowa, 435; Child v. Dodd, 51 Ind. 484; State v. Clover, 16 N. J. L. 419; Faulke v. People, 4 Colo. App. 519, 36 Pac. Rep. 640. There are, it must be admitted, a very few cases to the contrary. Bonnett v. Bonnett, 61 Iowa, 199, 16 N. W. Rep. 91; West Gardner v. Manchester, 72 Me. 509. But these cases certainly are not in harmony with the weight of authority or the best reasoning.

³ Jones v. Cleghorn, 54 Ga. 9.

⁴ Copeland v. State, 60 Ind. 394.

is binding on the mother.¹ But the right of the parent to the custody of his infant child is not lost by permitting it to be taken away from its home by another.² And this is true though the child is thus turned over by the father to the mother.³ And where the custody of a child was given to a third person by the father in a will under the local laws, which required such person to appear before the probate within a stated time and accept the appointment, the right of such person to the custody of the child is lost by failing to comply with this requirement, though he took the custody of the child at once and kept it for a year, and though the mother, who was entitled to the custody of the child by law, otherwise had relinquished this right to such custodian in writing.⁴

§ 565. Who entitled to when very young.—To the rule that the father is the recognized custodian of his infant children there is a well-recognized exception in cases of children of such tender years as to need the nurture and care which a mother only can well give. When this is the case, then the infant will never, as a rule, be taken from the care of the mother until it has arrived at such an age as will permit it being taken from her without danger or injury.⁵ Accordingly, in an action for divorce, it is held that the mother is the proper person in whom to place the care and custody of a four-year-old child of the marriage.⁶ Likewise where the child is only five

¹ *Brown v. Brown* (Va.), 24 S. E. Rep. 238.

² *Villareal v. Mellish*, 2 Swans. 567; *State ex rel. Mayne v. Baldwin*, 1 Halst. Ch. 454; *Ex parte Hopkins*, 3 P. Wms. 152; *In re Reynolds*, 8 N. Y. S. 172.

³ *Johnson v. Terry*, 34 Conn. 259; *Hunt v. Hunt*, 4 Greene (Iowa), 216. The father may not shirk the duty imposed upon him by law as such by thus disposing of the child to its mother, and who, next to the father, is regarded as the most fit person for its custody.

⁴ *Cook v. Bybee*, 24 Tex. 278; *State ex rel. Mayne v. Baldwin*, 1 Halst. Ch. 454; *Villareal v. Mellish*, 2 Swans. 567; *Johnson v. Terry*, 34 Conn. 259;

Commonwealth v. M'Keagy, 1 Ashm. (Pa.) 240; *People v. Mercein*, 3 Hill (N. Y.), 399.

⁵ *Anonymous*, 55 Ala. 428; *Wand v. Wand*, 14 Cal. 512; *Brandon v. Brandon*, 14 Kan. 342; *Smith v. Smith*, 15 Wash. 287, 46 Pac. Rep. 234; *State ex rel. Kirkpatrick v. Kirkpatrick*, 54 Iowa, 373, 6 N. W. Rep. 588. In this case the child was but fifteen months old and unweaned, and the mother not having been shown to be an improper person to have it during early childhood, the court very properly concluded that the interests of the child demanded that it remain with its mother.

⁶ *Smith v. Smith* (Wash.), 46 Pac. Rep. 234.

years of age.¹ And when children are very young it is the policy of the law to award the custody to one or the other natural parent rather than to the care of a stranger, provided always, of course, one or the other of the parents be reasonably fit for the trust.² In a sense the courts of chancery are the guardians of the rights and privileges of infants, and will protect them from violence, abuse and extreme ill treatment even to the extent, when necessary for the safety or welfare of the child, of taking it entirely from either or both natural parents, and awarding its custody to some suitable person approved by the court for fitness. When the parents become abandoned and so lost to their duties as such, they thereby forfeit the privilege of rearing a child, and the courts will see that the infant is placed with one more worthy the duties and responsibilities of properly raising it.³ And the fact that by statute the surviving parent is given the absolute right to the custody of the children does not alter the rule. This is little if anything more than a declaration of the common law, and in no case will such a statute be so construed as to tie the hands of the courts in their efforts to see that the innocent and helpless children have the protecting care of their power and authority.⁴ But at the same time the law is jealous of the rights of the natural parents, and in no instance will their custody of their children be interfered with by the courts unless it be palpably clear that it is imperatively necessary in order that the welfare of the child may be properly guarded and protected.⁵

§ 566. Conflicting claims of parents.—In deciding which parent should have the custody of a child, the courts, looking with a guarded and cautious eye to the welfare and best inter-

¹ *Beene v. Beene*, 64 Ark. 518, 43 S. W. Rep. 968.

² *Norval v. Tinmaster* (Neb.), 77 N. W. Rep. 373.

³ *In re Goodenough*, 19 Wis. 204; *Schlitz v. Roenitz*, 86 Wis. 37, 56 N. W. Rep. 194; *Corrie v. Corrie*, 42 Mich. 509, 4 N. W. Rep. 213; *Bryan v. Lyon*, 104 Ind. 227, 3 N. E. Rep. 880; *In re*

Blackburn, 42 Mo. App. 622; *Lally v. Sullivan*, 85 Iowa, 49, 51 N. W. Rep. 1155; *Sheers v. Stein*, 75 Wis. 51, 43 N. W. Rep. 728; *State v. Grigsby*, 38 Ark. 406.

⁴ *Lally v. Sullivan*, 85 Iowa, 49, 51 N. W. Rep. 1155.

⁵ *Commonwealth v. M'Keagy*, 1 Ashm. (Pa.) 248.

est of the infant, will take into consideration the capability, the financial, moral and intellectual acquirements and standing of the respective parties, as well as their health and the health of the children, and, in short, all other things, facts and circumstances that would tend to make the one or the other the most suitable person in whom to confide the custody of the infant.¹ Neither parent has any vested interest in the custody of the infant children such as to prevent the courts awarding the custody of children to the one who will best guard the interest and well-being of the child. The rights and wishes of either or both parents, while persuasive in a sense, are subservient to the controlling consideration, the welfare of the child.² Usually the custody will not be given to the parent who is the most coarse, vulgar, intemperate or irreligious. And where one or the other is addicted to such habits as opium eating, drunkenness, etc., the preference will be for the other parent, if without fault or least in fault.³ Nor will the custody be given to an insane parent.⁴ Where by statute it is provided that both parents have equal rights respecting the custody of their children, neither can deprive the other of the exclusive right to this custody as survivor by the appointment of a testamentary guardian to take control of the children.⁵ When the circumstances require, the child may be taken from the father and placed with the mother, and *vice versa*.⁶ But in awarding the custody of the child to either parent, the court will usually order that the other be permitted to see and visit it on all proper occasions and at all proper times, to the end that the ties of love and confidence be kept alive.⁷ Where a

¹ Bonney v. Bonney (Ky.), 3 S. W. Rep. 171; Bonney v. Bonney (Ky.), 9 S. W. Rep. 404; Farrar v. Farrar, 75 Iowa, 125, 39 N. W. Rep. 226; Marshall v. Reams, 32 Fla. 499, 14 S. Rep. 95; Slater v. Slater, 90 Va. 845, 20 S. E. Rep. 780; State ex rel. Flint v. Flint (Minn.), 65 N. W. Rep. 272.

² Giles v. Giles, 30 Neb. 624, 47 N. W. Rep. 916; United States v. Green, 3 Mason, 482; People ex rel. Barry v. Mercein, 8 Paige, 47.

³ Finley v. Finley (Ky.), 2 S. W. Rep. 554.

⁴ State v. Reuff, 29 W. Va. 751, 2 S. E. Rep. 801.

⁵ People v. Brugman, 38 N. Y. 193.

⁶ Miller v. Miller (Fla.), 20 S. Rep. 989; Barry v. Mercein, 8 Paige, 47.

⁷ Bates v. Bates (Ill.), 46 N. E. Rep. 1078; Haley v. Haley, 44 Ark. 429.

There is doubtless an exception to this rule in cases where the parent is so lost to virtue and morality that any association of the child with such parent would tend to corrupt and pervert its morals, or perhaps in any other condition of things which

woman marries a man whom she has grossly deceived as to chastity, she being pregnant at the time of marriage, upon a decree of divorce for this reason, the child will be consigned to the care of the mother, as the husband is not the real father, and has no right of custody of a bastard child.¹ In fact the husband, in such a case, would not be the father, and very properly would have no right to contend for the custody of a child to whom he bears no blood relationship. To such a child the husband is a complete stranger, and he would have no greater right to its custody than would any other stranger.

§ 567. Conflicting rights of parents and third persons.—

When by reason of the death of the mother a child is too young to be cared for by the father, and it is intrusted to others to be reared to a suitable age, with the consent of the father, the latter will have no right to the possession of the child as against such custodian until the child arrives at a suitable age. Naturally under such circumstances the child grows up as one of a new family, in a sense, and forms new attachments and associations by reason of the environments which thus surround it in its new condition, and which it would be violent to break up by a change, especially a sudden one, when it becomes older and these attachments take a firmer hold of it. It is usually held, therefore, that notwithstanding the fact that the father cannot delegate his authority to control the child, as a general rule, yet if the best interests of the child require that it remain either permanently or for a time with its adopted parents, the father or mother, or both, as the case may be, will be denied the custody of the child.² After the affections of both the child

would make it to the manifest prejudice of the good qualities of the child to have such parent visit it. Of course, the right to visit a child will rarely be denied, and doubtless the instances where it would be proper are very few; and the courts will only with reluctance, guided by caution and prudence, forbid any access to the parent whose right of custody is denied.

¹ *Morris v. Morris*, Wright (Ohio), 630.

² *In re Snook*, 54 Kan. 29, 38 Pac. Rep. 272; *Legate v. Legate*, 87 Tex. 248, 28 S. W. Rep. 281; *State ex rel. Filbert v. Schroeder*, 37 Neb. 571, 38 N. W. Rep. 307; *Cunningham v. Barnes*, 37 W. Va. 746, 17 S. E. Rep. 308; *In re Stockman*, 71 Mich. 180, 33 N. W. Rep. 876; *Washaw v. Gimble*, 50 Ark. 351, 7 S. W. Rep. 389; *Green v. Campbell*, 35 W. Va. 698, 14 S. E. Rep. 212; *Legate v. Legate* (Tex. Civ. App.), 29 S. W. Rep. 212; *Sheers v. Stein*, 75 Wis. 44, 43 N. W. Rep. 728;

and adopted parent become fixed, and a condition of things has thus arisen which cannot be suddenly changed without endangering the happiness and welfare of the child, as well as its custodian to some extent, and the father wishes to then reclaim it, the better authority seems to be that he is not in a position to have the interference of a court in his favor. His parental rights must yield to the feelings, interests and rights of the third parties and of the child whose custody they have acquired by and with the consent and perhaps at the urgent solicitation of the parent.¹ This rule is founded upon the fact that by continued contact and intercourse the affections and interests of the foster parent become very marked towards the child, as do those of the child towards its new parents. But it does not apply in a case where the child is turned over to a corporation which may be controlled one day by one person and the next by another.² And the courts lend a ready ear to a petition asking for a change of custody of an infant which is in the control of a stranger by whom he is cruelly treated and immoderately whipped.³ And a stranger having no natural or other right to the care and control of the person of an infant, the question of the competency of the natural parents to care for it, so long as they are not immoral or cruel to an extent that might seriously affect the child's permanent welfare, will not be seriously considered.⁴ But where by reason of the gross

In *re Gates*, 95 Cal. 461, 30 Pac. Rep. 596. This is held to be true in Wisconsin, though by statute in this state (Rev. St. Wis., § 3964) "the father of the minor, if living, and, in case of his death, the mother while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the custody of the person of the minor, and to the care of his education." Indeed, this statute can be but little more than declaratory of the common law. It clearly leaves open the inquiry as to the suitability of the parent for the care and control of the child. *Sheers v. Stein*, 75 Wis. 44, 43 N. W. Rep. 728.

¹ *Clark v. Bayer*, 32 Ohio St. 299, 306; *Jones v. Darnall*, 103 Ind. 569, 2 N. E. Rep. 229; *Hoxsie v. Potter*, 16 R. I. 374; *Townsend v. Warren* (Ga.), 24 S. E. Rep. 960; *Bonnett v. Bonnett*, 61 Iowa, 199, 16 N. W. Rep. 91; *In re Beckwith*, 43 Kan. 159, 28 Pac. Rep. 164; *Merrett v. Swinley*, 82 Va. 433; *In re Reinman*, 10 N. Y. S. 516; *Paddock v. Eager*, 10 N. Y. S. 710; *Coffee v. Black*, 82 Va. 567; *In re Blackburn*, 41 Mo. App. 622; *People v. Trafford*, 12 N. Y. S. 43.

² *Lovell v. Home of the Good Shepherd*, 9 Wash. 419, 37 Pac. Rep. 660.

³ *Marshall v. Reams*, 32 Fla. 499, 14 S. Rep. 95.

⁴ *Lovell v. Home of the Good Shepherd*, 9 Wash. 419, 37 Pac. Rep. 660.

immorality, drunkenness, cruelty or debauchery of the parent the good morals of the child will be seriously endangered, a court of chancery will readily order an infant, upon proper showing, to be taken from his natural parent, and intrusted to some suitable person under whose influence and training the child will probably become a moral and useful citizen.¹

§ 568. Poverty of parents as a consideration governing the right of custody.—The poverty alone of the parents, so long as they are moral, affectionate and kind to their children, so long as they strive to live as exemplary citizens, and with all their means and resources in good faith to act the full part of parents towards their children, will rarely, if ever, be considered a sufficient reason for taking the custody of children from them and lodging it in a stranger. The solicitous interest felt by the parent in the welfare and well-being of his offspring is paramount to the luxuries of wealth or the dignity of social or other station. These are to be desired, it is true, but not at the expense of breaking up the strong and affectionate ties between parent and child and the estrangement necessarily resulting from such a condition of things. No one has the same interest in the child that its natural parent and natural guardian has, and the experience of the ages testifies that it is far better to allow a child to grow up with its parents, though ever so poor, so long as they are otherwise fit persons for such custody.² This idea is supported by the fact of everyday observation that the children of rich parents often make a failure of life, while poor children often achieve the greatest success.

§ 569. Rule in case of bastards.—The rule that the father is the natural guardian of his infant child has no application to cases of bastards. A bastard is supposed in law to be *nul- lius filius*; but such person, nevertheless, has a natural guardian in the person of the known mother. Upon her is devolved the duty, in a sense at least, of caring for, nurturing, educating and maintaining such unfortunate issue, and in return for

¹ State v. Grisby, 38 Ark. 406.

ston v. Johnston, 89 Wis. 416, 62 N.

² Verser v. Ford, 37 Ark. 27; Lovell v. Home of the Good Shepherd, 9 Wash. 419, 37 Pac. Rep. 660; John-
W. Rep. 181. See, too, along this line, In re Young (N. C.), 26 N. E. Rep. 693.

these burdens the law gives her the care, custody and control of the person of the bastard during minority, just as this trust is reposed in the father of a legitimate child.¹ But the right of the mother to the custody of her bastard child is not absolute. Whenever, therefore, it appears that she is manifestly unsuited to give it proper training, it will be taken from her and placed where its welfare will be best promoted.² If the mother of a bastard should die during its minority, the actual father, if known, succeeds to the right of custody as being next in right to the real mother.³ The mother of the issue of a void marriage at common law has the right of custody of the child.⁴

§ 570. Rights of third persons.— Those other than parents, unless guardians appointed in due form of law, have no right, as a rule, to the custody of the children of another. This being true, it is properly held that grandparents have no right whatever to the custody of their grandchildren, though the father be dead and the mother consent to such custody. The mother may, in such case, take her children from such grandparents, though she may have consented to the custody of the grandparents.⁵ But where a parent on his death-bed gives the care and custody of the child to the paternal grandparents, which is expressly ratified and agreed to until his death, the maternal grandparents have no right to interfere with the custody and control exercised by the paternal grandparents.⁶ Indeed, where a child is left to the care of a stranger by its parents, no other stranger has the right, in the absence of the utter unfitness of such stranger to care for the child, to question such right of custody.⁷ To tolerate such officious interference by a stranger having no interest in the child, when its custodian is a fit person, would simply be to tolerate meddlesomeness.

¹ *Friensner v. Symonds*, 46 N. J. Eq. 521, 20 Atl. Rep. 527; *Barnardo v. McHugh*, App. Cas. (1891), 388; *Marshall v. Reams*, 82 Fla. 499, 14 S. Rep. 95; *In re Hope (R. L.)*, 34 Atl. Rep. 994; *People v. Kling*, 6 Barb. 366; *People v. Landt*, 2 Johns. 375; *People v. Mitchell*, 44 Barb. 245, 249; *Somerset v. Dighton*, 12 Mass. 383, 387; *Robalinas v. Armstrong*, 15 Barb. 247; *Petersham v. Dana*, 12 Mass. 429.

² *In re Hope (R. L.)*, 34 Atl. Rep. 994.

³ *County of Dodge v. Kemnitz*, 32 Neb. 238, 49 N. W. Rep. 226.

⁴ *Morris v. Morris, Wright (Ohio)*, 630.

⁵ *Villarael v. Mellish*, 2 Swans. 567; *Latham v. Ellis*, 116 N. C. 30, 20 N. E. Rep. 1012.

⁶ *Stroupe v. Chase*, 94 Ga. 410, 20 S. E. Rep. 418.

⁷ *Jones v. Harmon*, 27 Fla. 238, 9 S. Rep. 245.

§ 571. **Right of children to select custodian.**— Aside from the right usually given by statute permitting infants, when they arrive at a certain age, to select a guardian, the law recognizes, in a degree, the right of the child to choose a custodian whenever it may have reached an age at which it may make an intelligent choice. This is on the ground that the happiness and welfare of the child are the vital questions to be considered, and to the end that this may be promoted as far as possible, courts will yield, to a large extent, to the wishes of the child concerned.¹ But the wishes of an infant, in either awarding or changing custody, can have but little influence with the court where the child is of such tender years as to be unable to make an intelligent selection.² Nor will the wishes of the child be considered favorably in any case when manifestly contrary to the child's welfare and interest.³ At what time a child arrives at the age of discretion in this respect is to be ascertained from the mental development as well as age, considered in connection with the development of mind; and the question will ordinarily be one of fact, and rest largely within the sound discretion of the court.⁴

§ 572. **Right of father to bind his child out as an apprentice.**— While neither parent can relieve himself of his duty to his children by confiding their custody and the care of their persons to strangers, yet he may provide for their future usefulness by binding them out under the law as apprentices to learn a calling for later years. To this extent only is this right to release the parental control recognized by law; and it is based upon the idea that this arrangement is necessary for the future welfare and usefulness of the child and that it redounds to his benefit. It is part of a practical education, and the custody and care of the child is necessarily confided

¹ *Cocke v. Hannum*, 39 Miss. 423; 64; *State v. Smith*, 6 Greenl. (Me.) People v. Porter, 23 Ill. App. 196; 462; *State ex rel. Paine v. Paine*, 4 Green v. Campbell, 35 W. Va. 698, 14 Humph. (Tenn.) 523.

S. E. Rep. 212; *Armstrong v. Stone*, 9 Gratt. (Va.) 102, 107; *In re Gates*, 95 Cal. 461, 30 Pac. Rep. 596; *Marshall v. Reams*, 32 Fla. 499, 14 S. Rep. 95;

Harris v. Harris, 115 N. C. 587, 20 S. E. Rep. 186; *McShan v. McShan*, 56 Miss. 418; *Mercein v. Barry*, 25 Wend.

² *Jones v. Harmon*, 27 Fla. 238, 8 S. Rep. 245.

³ *Marshall v. Reams*, 32 Fla. 499, 14 S. Rep. 95.

⁴ *Marshall v. Reams*, 32 Fla. 499, 14 S. Rep. 95.

to the master to the extent necessary for the child to learn the trade, just as the control of a child is surrendered to a teacher during school hours to the end that he may receive proper instruction.¹

§ 573. Custody of children — Discretion of court in awarding.— Generally, it is a matter largely within the discretion of a court as to what shall be done with the person of an infant when an issue arises as to the right of custody of an infant child. The courts will look to all the circumstances of the case "as relating to the simple consideration what is best to be done for the child."² In Maine it is provided by statute³ that "the court making a decree of nullity, or of divorce, may also decree concerning the care, custody and support of the minor children of the parties, and with which parent any of them shall live, and alter the decree from time to time as circumstances may require." Under this statute it is held that the awarding of the custody of an infant will not be disturbed on appeal where the discretion of the chancellor has not been manifestly abused; and that a decree of this nature is binding, the jurisdiction having attached regularly, though the infant be afterwards removed from the state.⁴

§ 574. What courts have jurisdiction to award.— Ordinarily the courts of chancery have jurisdiction to make all proper orders and decrees with reference to the custody and control of infants. These courts may order infants wrongfully restrained of their liberty or in violation of the rights of others to be surrendered to the possession of the person having the right of custody of the child; they may require of the person so wrongfully detaining the infant that it be surrendered up to the proper and lawful custodian, and enforce such an order just as may be done in any other proceeding.⁵

¹ *State v. Reuff*, 29 W. Va. 151, 2 S. E. Rep. 801; *DeJarnett v. Harper*, 45 Mo. App. 415.

² *DeManneville v. DeManneville*, 10 Ves. 52, 62; *United States v. Sauvage*, 91 Fed. Rep. 490.

³ Rev. St. Me., ch. 60, § 17.

⁴ *Stetson v. Stetson*, 80 Me. 483, 15 Atl. Rep. 60.

⁵ *Buckley v. Perrine* (N. J. Eq.), 34 Atl. Rep. 1054; *Richards v. Collins*, 45 N. J. Eq. 283, 17 Atl. Rep. 831; *In re Woman's North Pacific Presbyterian Board of Missions*, 18 Oreg. 339, 22 Pac. Rep. 1105; *Bowles v. Dixon*, 32 Ark. 92; *English v. English*, 32 N. J. Eq. 738, 743.

The writ of *habeas corpus* is frequently resorted to in order to obtain the custody of a child unlawfully detained and is an effective remedy. As applied to proceedings of this nature, it is in the nature of an equitable proceeding.¹ It is effective not only to relieve the child from improper restraint, but to determine in whom is lodged by law the lawful custody of the infant and award it accordingly.² The federal courts, however, have no jurisdiction or authority to award the custody of an infant on *habeas corpus* or other proceeding, nor to change or modify the rulings of a state court disposing of the question of the lawful custody of an infant. Such matters belong exclusively to the polity and laws of the states.³

§ 575. Custody of children — Rights of parents upon decree of divorce.—The courts frequently regard the fault of one or the other parent in a divorce proceeding as sufficient to forfeit the right of custody in the parent against whom the decree is granted, and grant to the parent not in fault the custody of the issue of the marriage. By forfeiting the right to have the marital state continue, the parent at the same time and by the same act forfeits, likewise, the incidental right to the custody of the children, though of course the courts will not always be governed by this as an inflexible rule if the interests of the child require a different conclusion.⁴ And when the decree of divorce fixes the rights of the respective parents with reference to the custody of the children, this will, as a general rule at least, preclude both of them.⁵ It is also within the power and authority of a court of chancery to award the temporary control of infants to one or the other party to a proceeding for divorce, or even to a stranger, if absolutely neces-

¹ Wright v. Johnson, 5 Ark. 687; Verser v. Ford, 37 Ark. 27; Richards v. Collins, 45 N. J. Eq. 283, 17 Atl. Rep. 831; In re Barry, 42 Fed. Rep. 113; Green v. Campbell, 35 W. Va. 698, 14 S. E. Rep. 212; Legate v. Legate, 87 Tex. 248, 28 S. W. Rep. 281; Nebraska Children's Home Soc. v. State (Neb.), 78 N. W. Rep. 267.

² Miller v. Miller (Fla.), 20 S. Rep. 989.

³ In re Barry, 42 Fed. Rep. 113; Ex

parte Burrus, 136 U. S. 586, 10 Sup. Ct. Rep. 850; Ex parte Barry, 2 How. (U. S.) 115; Barry v. Mercein, 5 How. (U. S.) 103.

⁴ Waring v. Waring, 100 N. Y. 570, 3 N. E. Rep. 289; Klien v. Klien, 47 Mich. 518, 11 N. W. Rep. 367; Anonymous, 55 Ala. 428, 431; Griffin v. Griffin (Utah), 55 Pac. Rep. 84.

⁵ State ex rel. Giroux v. Giroux (Mont.), 47 Pac. Rep. 798.

sary, pending the result.¹ In granting the decree of divorce the court will award the custody of the child to the mother, where it would have better mental and moral training and more refining religious influences with the mother than with the father.² Looking to the welfare and best interests of the child in cases of divorce, as well as in all other instances involving the right of custody of children, the courts will take into consideration the age as well as the sex of the children, and, of course, the fitness of the respective parties as custodians. And upon this principle it has been held that the custody of a boy of sixteen should be awarded to the father, he being a fit and suitable person, and the custody of a younger girl of the marriage to the mother, as the boy at this age would need the care and discipline of the father, while the girl would more properly require the care and training of a mother.³ This is especially true when the father's own misconduct has entitled the mother to a dissolution of the marriage.⁴

¹ Green v. Green, 52 Iowa, 403, 3 N. W. Rep. 429.

² Lyle v. Lyle, 86 Tenn. 372, 6 S. W. Rep. 878. In the case of Messinger v. Messinger, 56 Mo. 329, the husband was granted a divorce for the wife's desertion; yet, as the children were young, they were consigned to the care and control of the wife. "In regard to the children," say the court, "we have great objections to depriving the mother of the control of infant children when they are females, and when the mother is entirely competent and peculiarly adapted to bring up and educate them; and although the law gives the father the custody of such children generally, we think the decree directed in favor of the defendant should be so framed as to continue the care and custody of the children in the plaintiff; subject, however, to the subsequent order of the court."

³ Irwin v. Irwin (Ky.), 49 S. W. Rep. 432.

⁴ Cocke v. Hannum, 39 Miss. 423, 439, 440. In this case the learned court, *inter alia*, said: "The father

should not be permitted, when his own violation of duty has produced a dissolution of the marriage, to deprive the mother of her child to which she was entitled by fidelity to the marriage vow. Hence it has been held that the right of the father is forfeited by his misconduct (People v. Cherry, 18 Wend. 637); and surely no misconduct on the part of the husband is more flagrant than adultery. It is most just that the consequences of his own guilt should be visited upon him and not upon the injured mother. But the rule which would give him the custody of the child under such circumstances would reward the guilty and punish the innocent. It would put it in the power of the husband, after having destroyed the rights and the happiness of the wife, to commit the further wrong of depriving her of her child, which might be the only comfort left her. The contrary rule is not only one of justice and humanity to the wife, but it would have a tendency to strengthen that bond of the marriage relation consisting in the

“In awarding the custody of children upon a decree for divorce or separation, the courts look primarily to the fitness of the parties and their adaptability to the task of caring for them, taking into consideration the age, sex, state of health and other circumstances in the lives of the children.”¹ And where neither of the parties to the divorce suit is a fit person to have the custody of the children, they will usually be given to the one least in fault, unless both are so grossly unsuitable as to require the placing of the children elsewhere.² So, where a wife is granted a divorce because of the extreme cruelty of the husband, she will, as a rule, be awarded the care and control of the children.³ And the tendency of the courts in divorce cases now is to award the custody of very young children to the mother if she be a fit person for the trust.⁴ But a court which only obtains jurisdiction of the defendant in divorce proceedings by publication has no authority to award the custody

love which the father has for his children, and which would induce him to be faithful to his marriage vows in order not to lose the society and comfort of his children.” In this case the husband, when sober, was an intelligent, high-minded man, moving in good society; but he would get drunk, and when so, would be guilty of the conduct of one lost to decency; would indulge in vulgarities and obscene language in the presence of his family and others. It was also shown that “the mother was frequently under violent anger and excitement towards the father in broils which took place between them when he was in a state of intoxication; that she once inflicted a severe blow upon him with a hatchet when he was about to whip her with a horsewhip, and on other occasions prepared and exhibited weapons to protect herself against him; that she was charged with incontinence and lewdness before he married her; but that he considered the charges false and married her with a knowledge of them.” It was also shown, in her

behalf, however, that her character was unexceptionable; that she was visited and recognized by the most respectable ladies in her locality; that she was remarkable for her attention to the education and morals of her children and for her fondness and solicitude towards them. This being true, the court thought the mother, not the father, the proper person for the custody of the children.

¹ Hochheimer, *Custody of Infants*, § 60;—*Cole v. Cole*, 23 Iowa, 433.

² *Prather v. Prather* (Iowa), 68 N. W. Rep. 806.

³ *Klein v. Klein*, 47 Mich. 518, 11 N. W. Rep. 367; *Meyers v. Meyers*, 83 Va. 806, 6 S. E. Rep. 630; *Wilkinson v. Deming*, 80 Ill. 342; *Pauly v. Pauly*, 69 Wis. 419, 34 N. W. Rep. 512; *Owens v. Owens* (Va.), 31 S. E. Rep. 72; *Wand v. Wand*, 14 Cal. 512; *Noel v. Noel*, 24 N. J. Eq. 137; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Thomas v. Thomas*, 20 N. J. Eq. 97.

⁴ *Anonymous*, 55 Ala. 428; *Wand v. Wand*, 14 Cal. 512; *Brandon v. Brandon*, 14 Kan. 342.

of the issue of the marriage, they being all the while in another state.¹ But where one party to a divorce proceeding has been awarded the custody of a child of the marriage, such party may not attempt to estrange the child from the other; and if this is persisted in, the court may restore the child to the other party or to a third person, if proper.² And though a child be awarded to one person, if future developments require that it be restored to the other, this will be done.³

§ 576. Right of parent when children are detained under process of law.—The right of the parent to the custody of his infant child is well settled to be inferior to that of the welfare of the child. Further than this, it is inferior to the rights of the state when under its laws it becomes proper or necessary for the child to be punished or confined in a reformatory, charitable, or other like institution. The parent cannot thwart the aim and object of the law by asserting an authority over the child superior to the law itself. Were it otherwise the impotency of the law would be appalling. When, therefore, the child is deprived of its liberty and the parent of the custody of the child by due process of law regularly had, the right of the parent to the custody of the child is subdued and put in abeyance until such time as the infant, in due course of law, may be released.⁴ But the courts, recognizing the sacred ties which bind parent and child together, do not favor agreements between parents and strangers whereby the parent attempts to surrender to another the custody and control over the child.⁵ And upon this principle it is always with reluctance that a court of competent jurisdiction will take an infant from the custody of its parents and award the custody to a stranger. It must be imperatively necessary for the best interests of the child, and neither the poverty of the parent nor the wealth of the contemplated custodian is sufficient to justify this harsh measure.⁶

¹ *Kline v. Kline*, 57 Iowa, 386, 10 N. W. Rep. 825.

² *Sherwood v. Sherwood*, 56 Iowa, 608, 10 N. W. Rep. 98.

³ *Jennings v. Jennings*, 16 Iowa, 288, 9 N. W. Rep. 222. Otherwise, however, when the custody thus fixed

will be permanent. *Hammond v. Hammond*, 90 Ga. 527, 16 S. E. Rep. 265.

⁴ *In re Diss De Bar*, 3 N. Y. S. 667.

⁵ *Beller v. Jones*, 22 Ark. 92; *Verser v. Ford*, 37 Ark. 27.

⁶ *Verser v. Ford*, 37 Ark. 27.

§ 577. **Orphans — Right of guardian to custody.**—As a rule, a general guardian of an infant child has the right to the care and custody of his infant ward. He will be deemed to have such authority, though the law authorizes a guardian of the estate as well as one of the person of the ward, both of whom may or may not be the same person. But unless the authority of a general guardian is restricted exclusively to the management of the estate of his ward, he will have the legal right to the custody of the person also.¹ Of course, a guardian of the estate only, or a curator, has no authority or dominion over the person of the ward; the authority of such a guardian being restricted exclusively to authority over the property or estate.

§ 578. **Decision upon habeas corpus — Res judicata.**—The conclusion of a court upon a proceeding by *habeas corpus* to determine the right of custody of an infant is usually decisive of the rights of parties to the action, unless some future and different state of facts should arise.² But, upon principle, it would seem that whenever, in the logic of future events, a different state of case arises, as where the person to whom the child may be awarded becomes palpably unfit for the custody and control of the child by reason of immorality, crime, or other fault, another proceeding may be introduced to adjudicate his right of custody. And no doubt if the character or fitness of the person to whom the custody was in the first instance refused has since such time made him or her an appropriate custodian of the child, any court of competent jurisdiction would not, upon such a state of facts being clearly made to appear, reverse the order of things and take the child from the one to whom it was first given and place it with the one whose right of custody was at first denied. Or it might, in the discretion of the court, when it appeared necessary for the interests of the child, award it to a stranger entirely,³ as the parent has no absolute right to the custody of his infant children.⁴

¹ *Berger v. Frakes*, 67 Iowa, 460, 23 N. W. Rep. 746.

² *Mercein v. People*, 25 Wend. 64; *People v. Brady*, 56 N. Y. 182; *State v. Bechdel* (Minn.), 34 N. W. Rep. 334.

³ See *State v. Bechdel* (Minn.), 34 N. W. Rep. 335.

⁴ *Schlueter v. Canatsy* (Ind.), 47 N. E. Rep. 825.

CHAPTER VIII.

BASTARDS.

§ 579. Definition.

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581. Rule of inheritance in case of collateral and ascending kindred.

582, 594. Changes in the common law of inheritance as to bastards.

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591. Status of the issue of marriages between white persons and negroes.

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§ 595-597. Laws of inheritance—Conflict of laws.

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606. Status of children made legitimate by law.

607. Statutory changes in the common law as to persons born out of lawful wedlock.

608. Status of persons born in wedlock, but conceived before.

609-612. Conflict of laws governing legitimacy.

613. Rule of construction of statutes concerning bastards.

614. Domicile of bastards.

§ 579. Definition.— A bastard is an unhappy species of being, deprived of many of the vital rights and privileges of society. Aside from the unfortunate disgrace which he must receive as a humiliating heritage because of the sins of his parents, he is regarded by the common law as of kin to no one. Blackstone says that “a bastard, by our English laws, is one that is not only begotten, but *born* out of lawful matrimony. The civil and canon laws do not allow a man to remain a bastard, if the parents afterwards intermarry; and herein they differ most materially from our laws, which, though not so strict as to require the child to be begotten, yet makes it an indispensable condition to make it legitimate that it shall be born after law-

ful wedlock.”¹ After thus mentioning the English law relative to bastards, the learned commentator then proceeds to vindicate the English rule as preferable to the Roman law, and argues that, by the latter, a child may be continued a bastard or rendered legitimate at the option of the parents by subsequently marrying, which he thinks opens the door to many frauds. And also because a man may remain a bastard by this rule until after his majority, and then become legitimate after the necessity of protection in infancy has vanished by reaching mature age; because the rule admits no limits as to the time or number of bastards to be legitimated, and because of the uncertainty of the proof of paternity in these cases. A bastard has no relatives at common law.² In law he has no name and can have none until he has gained one by reputation. He must acquire his name, just as he must acquire what few rights he can enjoy under the law.³

§ 580. **Inheritance.**—A bastard, being regarded as *filius nullius* at common law, has no inheritable blood. He was regarded as the first of his kind.⁴ They cannot inherit by name, for they have no name in law until they have gained one by reputation; and they can then only inherit by the description the name affords, not as children.⁵ And as a bastard cannot acquire a name by reputation at his birth, he cannot take under a will at the time of the taking effect of which the bastard had not been born.⁶ But where a bequest is made to an illegitimate child, and it is so described that there can be no mistake as to who is meant by the testator, as, for instance, in case of a bequest to the first child to which a woman may give birth after the taking effect of the will, though this par-

¹ 1 Bl. Comm. 454, 455.

² *Hiram v. Pierce*, 45 Me. 367; *Cooley v. Dewey*, 4 Pick. (Mass.) 93; *Heath v. White*, 5 Conn. 232; 1 Bl. Comm. 458.

³ 1 Bl. Comm. 459; *Blacklaws v. Milne*, 82 Ill. 505; *Stoltz v. Doering*, 112 Ill. 234.

⁴ *Floyd v. Floyd* (Ga.), 24 S. E. Rep. 451; *Jackson v. Jackson*, 78 Ky. 390; *Sutton v. Sutton*, 87 Ky. 216, 8 S. W. Rep. 337; *Butler v. Elyton Land Co.*,

84 Ala. 384, 4 S. Rep. 675; 2 Bl. Comm. 247; *Stephenson v. Sullivant*, 5 Wheat. 207. But a bastard is capable of taking property as legatee or devisee if *in esse*, whether born or unborn. *Gaines v. Hennen*, 24 How. (U. S.) 553; *Hicks v. Smith*, 94 Ga. 809, 23 S. E. Rep. 153.

⁵ *Metham v. Duke of Devonshire*, 1 P. Wms. 529.

⁶ *Earle v. Wilson*, 17 Ves. Jr. 528.

ticular child be a bastard unborn at the time the will goes into effect, it will nevertheless take as a devisee under the will.¹ It will be seen, therefore, that the reason why a bastard may not take under a will at common law is, he is known by no name or description. Having none by descent, and there being no way to designate him except by some accurate and particular description which will obviate any uncertainty as to the person meant, in the absence of such description he can never take as a legatee because of blood relationship in fact or otherwise. But when a bastard acquires a name by reputation, he may then purchase by his reputed name to himself and his heirs, though he can have no heirs other than those who are the descendants of his body.²

§ 581. Inheritance — Collateral and ascending kindred.—

As a bastard is the son of no one, he can have no kindred in the collateral line nor any in the ascending lineal line. He begins his race, and has no relations in law except those begotten of his body.³ But while the lineal descendants of a bastard may inherit from him, yet if he die without issue his race ceases — there is none to take from him; for he can have no collateral heirs, and his property will escheat to the state.⁴ But the civil law was more favorable to the bastard than the law of England; and a bastard might thereunder succeed to the inheritance of his mother if she married his father.⁵ By the common law a bastard cannot even inherit from his mother. She is, of course, his blood relation in fact, yet the law in its strictness denies him the kinship even of his mother.⁶ The bastard cannot inherit from the parent, nor the parent from the bastard, though the identity of both parents be conclusively known.⁷ This is the rule of both the civil and common law.⁸

¹ *Gordon v. Gordon*, 1 Mer. 141, 153.

² *Idle v. Cook*, 1 Ld. Raym. 1144, 1152; 1 Bl. Comm. 459; *Coke Litt*, 3b.

³ 2 Bl. Comm. 247, 249; *Stephenson v. Sullivan*, 5 Wheat. 207.

⁴ *Jones v. Goodchild*, 3 P. Wms. 32; *Stephenson v. Sullivan*, 5 Wheat. 207; *Idle v. Cook*, 1 Ld. Raym. 1144, 1152. See also *Sutton v. Sutton*, 87 Ky. 216, 8 S. W. Rep. 337; *Ash v.*

Way, 2 Gratt. (Va.) 205; *Brewer v. Hamor*, 83 Me. 251, 22 Atl. Rep. 161.

⁵ 2 Bl. Comm. 247.

⁶ *Pratt v. Atwood*, 108 Mass. 40; *Cooley v. Dewey*, 4 Pick. (Mass.) 93.

⁷ *Hiram v. Pearce*, 45 Me. 367; *Cooley v. Dewey*, 4 Pick. (Mass.) 93.

⁸ *Stephenson v. Sullivan*, 5 Wheat. 207, 208.

Where a man marries a woman who is visibly pregnant, he is deemed in law to adopt the child by the act, but this adoption does not extend to the laws of inheritance; such child cannot, therefore, inherit as the natural heir of the adoptive parent, but must take as a bastard.¹

§ 582. Inheritance — Changes in the common law.— In many of the states the rule of the common law is so changed as to allow a bastard, under certain circumstances and restrictions, to inherit from its mother.² Under a statute which provided that illegitimate children might inherit from the father “whenever they have been recognized by him as his children, but which recognition must have been general and notorious, or else in writing,” and that such children could “inherit from the father whenever the paternity has been proven during the life of the father,” it was held that recognition of the illegitimate child by the father before the passage of the act was not sufficient to entitle the child to inherit.³ It would necessarily follow under this law that a father could cut off the right of his bastard children to inherit by repudiating them upon the passage of the law, though he had always before recognized them. These statutes changing the common law of inheritance as to bastards usually provide that “bastards shall be capable of inheritance or transmitting inheritance on the part of their mother in like manner as if they had been lawfully begotten of such mother.” By virtue of such a provision a mother may inherit from and transmit inheritance to her bastard child.⁴ And under a like statute it is held that children of the mother inherit with and in like manner as others born in lawful wedlock, and that the illegitimate children may transmit inheritance to lineal and collateral relations who are of the mother’s blood.⁵ And a bequest to such natural children of a mother

¹ *State v. Shoemaker*, 62 Iowa, 43, 17 N. W. Rep. 589. *Jessup’s Estate*, 81 Cal. 408, 22 Pac. Rep. 742.

² *Heath v. White*, 5 Conn. 228; *Lingen v. Lingen*, 45 Ala. 410; *McClell. Dig. (Fla.)*, p. 470, § 8; *Keech v. Enriquez*, 28 Fla. 597, 10 S. Rep. 90; *Sand. & H. Dig. (Ark.)*, § 2472. ⁴ *Stover v. Boswell*, 3 Dana (Ky.), 233; *Pettus v. Dawson*, 82 Tex. 18, 17 S. W. Rep. 714; *Brewer v. Hamor*, 83 Me. 251, 22 Atl. Rep. 161.

³ *Hartinger v. Ferring*, 24 Fed. Rep. 15. See *Butler v. Elyton Land Co.*, 84 Ala. 384, 4 S. W. Rep. 675; *In re field*, 16 R. L. 579, 18 Atl. Rep. 186. ⁵ *S. & H. Dig. (Ark.)*, § 2472; *Gregley v. Jackson*, 38 Ark. 487; *Pub. Stat. R. L.*, ch. 187, § 7; *Grundy v. Hadfield*, 16 R. L. 579, 18 Atl. Rep. 186.

as she may select, where she dies without making the selection, will inure to all the natural children she has at the time of her death, share and share alike, under this statute.¹ A statute providing that "an illegitimate child shall be considered as an heir of his mother, and shall inherit her estate in like manner as if he had been born in lawful wedlock," will not be extended by construction to embrace grandchildren;² but under such a statute one bastard may inherit from another where both are children of the same mother.³ Whether a bastard, however, under these and like statutes may inherit from his mother's collateral kindred is a question of serious importance, and one upon which the courts are far from harmonious. In an early case in the supreme court of the United States the construction of the Virginia statute in reference to the subject came up for adjudication. Under this law it was provided that bastards might inherit from their maternal ancestor "in like manner as if lawfully begotten of such mother," and it was contended that this language embraced collateral as well as lineal kindred on the maternal side. But the court decided otherwise, holding that a bastard under the act could not inherit from his mother's collateral kindred.⁴

¹ Carr v. Crane, 7 Ark. 240.

² Curtiss v. Hewins, 11 Metc. (Mass.) 294.

³ Burlington v. Fosby, 6 Vt. 83. But the right of the illegitimate person to inherit under these laws is governed by the law in force at the time of the event entitling him to inherit. Brewer v. Hamor, 83 Me. 251, 22 Atl. Rep. 161; Hatch v. Ferguson, 68 Fed. Rep. 43, 14 C. C. A. 41. See also Blankenship v. Ross (Ky.), 25 S. W. Rep. 268; Blair v. Adams, 59 Fed. Rep. 243.

⁴ The learned court, referring to this class of persons with reference to the law under consideration, said: "Though illegitimate, they may inherit and transmit inheritance on the part of the mother in like manner as if they had been lawfully begotten of the mother. What is the legal exposition of these expressions?

We understand it to be that they shall have a capacity to take real property by descent immediately or through their mother in the ascending line, and transmit the same to their lineal descendants, in like manner as if they were legitimate. This is uniformly the meaning of the expressions, "on the part of the mother or father," when used in reference to the course of descent of real property in the paternal or maternal line. As bastards they were incapable of inheriting the estate of their mother, notwithstanding they were the innocent offspring of her incontinence, and were therefore, in the view of the legislature, and consonant to the feelings of nature, justly entitled to be provided for out of such property as she might leave undisposed of at her death, or which would have vested in her, as heir to any of her

In many of the later cases, however, the courts have manifested a very strong disposition to break away from this early rule, and it is perhaps true that the trend of judicial thought inclines to the later rulings. The supreme court of appeals of Virginia squarely repudiated the construction placed upon the Virginia statute by the United States supreme court not very long after the announcement of the rule by the latter court, and held that a bastard might inherit through his mother both from her lineal and collateral kindred.¹ This rule has been affirmed in subsequent cases in this state.² It is also the doctrine in Vermont.³ The ruling of the United States supreme court was also repudiated by the supreme court of Ohio in the case of *Lewis v. Eutsler*,⁴ and the rule announced in Virginia has been adopted in Rhode Island.⁵ The Missouri court, however, follows the ruling of the United States supreme court, but does not mention or review any of the Virginia or other cases holding the contrary doctrine.⁶ The supreme court of Alabama, in a comparatively recent and well-considered case, has reviewed

ancestors, had she lived to take as such. The current of inheritable blood was stopped in its passage from and through the mother, so as to prevent the descent of the mother's property and of the property of her ancestors either to her own illegitimate children or to their legitimate offspring. The object of the legislature would seem to have been to remove this impediment to the transmission of inheritable blood from the bastard in the descending line, and to give him a capacity to inherit in the ascending line, and through his mother. But, although her bastard children are in these respects *quasi*-legitimate, they are, nevertheless, in all others, bastards, and as such they have, and can have, neither fathers, brothers or sisters." *Stephenson's Heirs v. Sullivant*, 5 Wheat. 207, 260, 261. It is noticeable that the learned court does not cite a single authority to sustain the rule announced. Other authorities are practically in harmony with this

case, some explicitly following it. *Pratt v. Atwood*, 108 Mass. 40; *Allen v. Ramsey*, 1 Metc. (Ky.) 635; *Berry v. Owens*, 5 Bush (Ky.), 452; *Scroggin v. Allen*, 2 Dana (Ky.), 63; *Sutton v. Sutton*, 87 Ky. 216, 8 S. W. Rep. 233.

¹ *Garland v. Harrison*, 8 Leigh (Va.), 368.

² *Hepburn v. Dundas*, 13 Gratt. (Va.) 219; *Bennett v. Toler*, 15 Gratt. (Va.) 588.

³ *Burlington v. Fosby*, 6 Vt. 83.

⁴ 4 Ohio St. 354, overruling an earlier case in this state in which the United States supreme court had been followed. *Little v. Lake*, 8 Ohio, 289.

⁵ *Briggs v. Greene*, 10 R. I. 495, which also refused to adopt the ruling of the United States supreme court, as adhering to a similar doctrine. See also *Gregley v. Jackson*, 38 Ark. 487; *Elder v. Bales*, 127 Ill. 425, 21 N. E. Rep. 621; *Briggs v. Greene*, 10 R. I. 495; *Grundy v. Hadfield*, 16 R. I. 579, 18 Atl. Rep. 186.

⁶ *Bent v. St. Vrain*, 30 Mo. 268.

all the authorities on the question, and arrives at the conclusion that a bastard may, under these statutes, inherit from both the lineal and collateral kindred of his mother.¹ The Illinois court also adopts this rule.² Upon this review of the conflicting cases it seems clear that the better reasoning is with the contention that bastards, under these acts, take precisely as though they were not bastards, which is really and strictly according to the provisions of the various statutes, all of which are substantially similar and have in view the same end and object. Certainly, a legitimate child may inherit from his maternal ancestor whether lineal or collateral. Then why may not a bastard, made by law capable of inheriting on the part of his mother as though legitimate, inherit from that mother in all cases where the legitimate heir could? If he cannot, he does not inherit as though legitimate, and if it be that he cannot inherit as though legitimate when the statutes expressly provide that he shall so inherit, it must be admitted that such statutes do not confer the rights and privileges they expressly purport to confer on bastards. In Kentucky, where it is settled that a bastard cannot inherit from his mother's collateral kindred, it is held that such collateral kindred of the mother cannot inherit through her from the bastard.³ In those jurisdictions, however, where the rule is that under these statutes a bastard may inherit from his collateral kindred on his mother's side, it would necessarily follow, as a logical sequence, that such kindred could inherit from the bastard through the mother. And in determining whether a law of inheritance will entitle a bastard to inherit, the law in force at the time of the death of the party from and through whom the inheritance is claimed will govern. If this law gives the right of inheritance to bastards they may inherit, otherwise not.⁴

§ 583. Status of children of void marriages — Change in the common law.— It is now frequently provided by statute, in order to avert complications in the law of descent, as well

¹ *Butler v. Elyton Land Co.*, 84 Ala. Rep. 177; *Lawton v. Lane* (Me.), 42 384, 4 S. Rep. 675. Atl. Rep. 352.

² *Bales v. Elder* (Ill.), 11 N. E. Rep. 421; *Jenkins v. Drane*, 121 Ill. 217, 12 S. W. Rep. 874.

³ *Croan v. Phelps*, 94 Ky. 213, 21 N. E. Rep. 684. And see *Hayden v. Barrett* (Mass.), 52 N. E. Rep. 580; ⁴ *Messer v. Jones*, 83 Me. 349, 84 Atl. Rep. 177.

Messer v. Jones, 88 Me. 349, 84 Atl.

as to fix a definite and certain status upon a class of children who would otherwise be illegitimate, that "the issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate."¹ But the effect of such statutes does not tend in any sense to validate the marriage itself; it only shields the issue from disgrace, confers the right of inheritance, and removes all the legal disabilities of bastardy. These laws are for the benefit of the issue of such marriages, and are not intended to confer any rights, privileges or immunities upon the parties to the unlawful marriage.² The effect of such legislation is to confer legitimacy, so far as inheriting property within the bounds of the state where the law is in force is concerned, upon *all* children of such void marriages, though they be citizens of another state under whose laws they could not take property by inheritance, and though the marriage of the parents may have been celebrated in such foreign state.³ In Mississippi the children of illegitimates and their descendants inherit from the brothers and sisters of their father or mother, whether legitimate or illegitimate, and from their grandparents.⁴

§ 584. Change in common law — Statutes conferring legitimacy by acknowledgment, etc.— In California⁵ it is provided by statute that the father of an illegitimate child, by publicly acknowledging it as his own and treating it generally as legitimate, thereby adopts it as his child and confers all the rights, privileges and immunities of legitimacy upon it. By another section of the Civil Code of this state⁶ it is provided that "every

¹ Sand. & H. Dig. (Ark.), § 2474; 1 Morch & B. (Ky.), p. 565; Workman v. Harold (Ky.), 2 S. W. Rep. 679. See, too, Graham v. Matthias, 63 Fed. Rep. 523; Cope v. Cope, 137 U. S. 682, 11 Sup. Ct. Rep. 222; Rev. St. (Mo.), § 4475; Green v. Green, 126 Mo. 17, 28 S. W. Rep. 752; Code Va. (1887), § 2554.

² Lincecum v. Lincecum, 3 Mo. 441; Green v. Green, 126 Mo. 17, 28 S. W. Rep. 752. Such legislation, as soon as enacted, confers the rights of legitimacy upon children whose parents were dead at the time of the passage

of the law. Gregley v. Jackson, 38 Ark. 487. It is not necessary that the marriage be dissolved by divorce in order that the children may be legitimate. Greene v. Greene, 126 Mo. 17, 28 S. W. Rep. 752; Heckert v. Hiles, 90 Va. 390, 18 S. E. Rep. 840.

³ Leonard v. Braswell (Ky.), 36 S. W. Rep. 684; In re Wasche's Estate, 3 Pa. Dist. Rep. 176.

⁴ Code Miss. (1892), § 1594; Hope v. Hoover (Miss.), 21 S. Rep. 134, 135.

⁵ Civil Code (Cal.), § 230.

⁶ § 1387.

legitimate child is an heir of any person who, in writing signed in the presence of a competent witness, acknowledges himself to be the father of such child." It is held in this state under these local laws that a father adopts a child where he writes letters to her in the presence of witnesses, addressing her as his child and signing himself as her father. And this is true though the mother was at all times domiciled in England, and the child was there begotten, and the father was at all times domiciled in California, the child having also been christened with the father's name at his request, and he having left a legacy to her in his will.¹ It is held in this state, however, that a secret or clandestine acknowledgment of a child is not sufficient under its law to effect an adoption so as to enable the bastard child to take property by descent as the heir of the owner.² It has been held that a letter written by the father of bastard children to the mother, in which he refers to them as his children, is a sufficient written recognition.³

§ 585. **Presumptive evidence of legitimacy.**—In consideration of the feelings of the child, as a partial atonement, perhaps, of the sin towards it of the parents, the law favors legitimacy, and will ordinarily seize upon any competent evidence to aid the presumption which will always be indulged where children are recognized by their parents, they being at least reputed to be lawfully married and recognizing each other so to be, that such issue are legitimate. When, therefore, parents recognize a child as their lawful issue until their death, this will, *prima facie*, establish the legitimacy of such child.⁴ Whenever the legitimacy of a child is called in question, public policy, as well as natural justice, requires that the charitable presumption of legitimacy be indulged. The law never strains itself to brand one a bastard, but always pre-

¹ Blythe v. Ayers, 96 Cal. 532, 31 Pac. Rep. 915; Blythe v. Ayers, 102 Cal. 254, 36 Pac. Rep. 522. See also Lind v. Burke (Neb.), 77 N. W. Rep. 444.

² In re Jessup's Estate, 81 Cal. 408, 22 Pac. Rep. 742.

³ Brown v. Iowa Legion of Honor (Iowa), 78 N. W. Rep. 73. And see to like effect, Crane v. Crane, 31 Iowa, 296.

⁴ Orthwein v. Thomas, 127 Ill. 554, 21 N. E. Rep. 430; Vaughn v. Rhodes, 2 McCord (S. C.), 227; Mayo v. Brown, 2 Lee. 391; Simon v. Richard, 42 La. Ann. 842, 8 S. Rep. 629; Strode v. McGowan, 2 Bush (Ky.), 621; In re Rebb's Estate, 37 S. C. 19, 16 S. E. Rep. 241; Fox v. Burke, 31 Minn. 319, 17 N. W. Rep. 861.

sumes legitimacy where persons are born in lawful wedlock, and all parties have in good faith acted upon the belief that the marriage was lawful. Any other presumption would make it most difficult to establish legitimacy, which is difficult to establish when called in question by direct and positive evidence at best.¹ If the marriage is once shown to have existed, the issue thereof will always be presumed legitimate until it be shown that it was impossible for the husband to have been the father thereof.² In fact, in all cases where the husband and wife live together, the law will not presume that the wife has been guilty of adultery, and thereby bastardize her issue. The presumption is, rather, that where there has been opportunity for intercourse between husband and wife, it has taken place. Nor, of course, does it make any difference that the child was not born till after the death of the husband, if it be within the generally recognized period of gestation. The North Carolina court of last resort thus well expresses the rule: "It is shown in evidence that the testator and his wife lived together in the same house for many years, and up to the time of the death of the former. By presumption of law, then, the plaintiff is his son, being born within two months after his death. The conception took place while the parties were married and while they lived together; and the rule is now well settled that where there is opportunity for sexual intercourse between a man and his wife, it is presumed it did take place unless the contrary be shown, provided there be issue. And if the intercourse might have occurred at a time when, by the course of nature, the husband might have been the father, the child is deemed his."³ So zealous, indeed, is the law in upholding the legitimacy of children, that this salient presumption will be indulged in favor of the issue of a marriage where the wife, at the time of entering into the marital state, is notoriously and visibly pregnant. It is held that the marriage of

¹ Johnson v. Johnson, 30 Mo. 72; 23, 21 Atl. Rep. 178; Orthwein v. Megginson v. Megginson, 21 Oreg. 387, 28 Pac. Rep. 388; Dannelli v. Neely v. McNeely, 47 La. Ann. 1321, 17 S. Rep. 928; Scanlon v. Walske, 81 Md. 118, 31 Atl. Rep. 498.
² Patterson v. Gaines, 6 How. 550.
³ Johnson v. Chapman, Bush. 213, 218.
Dannelli, 4 Bush (Ky.), 51; Baker v. Baker, 13 Cal. 87; State v. Romain, 58 Iowa, 46, 11 N. W. Rep. 721; Orthwein v. Thomas, 128 Ill. 554, 21 N. E. Rep. 430; Grant v. Mitchell, 83 Me.

a woman in that condition is a solemn admission by the man that the paternity of the child is chargeable to him.¹ "The marriage of the parties," says Lord Ellenborough, "is the criterion adopted by the law in cases of ante-nuptial generation for ascertaining the actual parentage of the child. For this purpose it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage."²

§ 586. Presumptions of legitimacy — Foundation of the rule.—The law always favors legitimacy, and will presume accordingly whenever it will not do violence to the facts and circumstances of the particular case. The presumption is necessary for the peace, order and welfare of society generally, and to shield the innocent child from the disgrace of bastardy as far as it is consistent and proper to do so, as well as to assure the legal status of such children as citizens of the state. Illegitimacy, therefore, must always be affirmatively proven; it is never presumed in any case.³ "The law presumes morality, not immorality; marriage, and not concubinage; legitimacy, and not bastardy. Where there is enough to create a foundation for the presumption of a marriage, it can only be repelled by the most cogent and satisfactory proof."⁴

§ 587. Presumptions of legitimacy — Lapse of time.—As the law so strongly favors legitimacy, it is often the case that slight proof will suffice to establish it. This is especially true after a long lapse of time and the incident difficulty in getting accurate and reliable evidence of the true parentage. In all

¹ *State v. Harman*, 13 Ired. (N. C.) 502, 503.

² *The King v. Luffe*, 8 East, 193.

³ *Teter v. Teter*, 101 Ind. 129.

⁴ *Watts v. Owens*, 62 Wis. 512, 22 N. W. Rep. 720; *Hynes v. McDermott*, 91 N. Y. 451. In a case where the child was born a week before the celebration of the marriage of the alleged parents, between whom an intimate courtship had existed for a year before the marriage; the husband being a seafaring man, and the child being born while he was on a voyage

which detained him from home much longer than had been expected; where, after the marriage, the parties continued to recognize each other as man and wife, and to recognize the child as their own, it was held that a finding of legitimacy was proper. *Starr v. Peck*, 1 Hill, 270. And the declarations of a deceased parent are usually held competent to prove the legitimacy of the offspring. *Jackson v. Jackson*, 80 Md. 176, 30 Atl. Rep. 752; *In re Picken's Estate*, 163 Pa. St. 14, 29 Atl. Rep. 875.

such cases, where the persons whose legitimacy is drawn in question have always been reputed legitimate, and where their parents are shown to have cohabited together as man and wife, the law will usually supply any needed evidence of the marriage and the legitimacy of the issue by a presumption which has the same force and effect.¹ And the courts are particularly ready to indulge this presumption where the parents, as well as the children whose legitimacy is at issue, are dead, and the march of time has hidden and obscured past events. For in such cases there can be little injury, usually, by indulging the presumption in favor of legitimacy, while to deny it would make proof of the actual facts necessary, and it might be impossible after many years to show the facts, though they may have existed, and though the proof at an earlier time might have been had without difficulty, and it would do great injustice to property rights as well as inflict disgrace upon the innocent.² After such a lapse of time the law properly presumes the necessary facts.³ The presumption takes the place of the facts.⁴

§ 588. What proof sufficient to establish legitimacy.—It is laid down in the Code Napoleon⁵ that “the enjoyment of the condition of legitimacy is established by a satisfactory combination of facts indicating the connection of parent and child between an individual and the family to which he belongs.” And this is likewise the rule of the common law. Some of the principal of these facts are “that the individual has always borne the name of his father to whom he claims to belong; that the father has treated him as his child, and in that character has provided for his education, his maintenance and his establishment; that he has been uniformly received as such in society and that he has been acknowledged as such by the family.”⁶ And this has been held to be true even where the

¹ Johnson v. Johnson, 30 Mo. 72; 120 U. S. 120, 7 Sup. Rep. 667; Snyder Johnson v. Johnson, 1 Desaus. Eq. (S. C.) 595. v. Snover, 56 N. J. L. 20, 27 Atl. Rep. 1013; Skipwith v. Martin, 50 Ark. 141,

² Martin v. Martin, 22 Ala. 86; Johnson v. Johnson, 30 Mo. 70.

³ Stimis v. Stimis (N. J. Eq.), 33 Atl. Rep. 468; Smith v. Cornelius (W. Va.), 23 S. E. Rep. 599; Fletcher v. Fuller,

155, 6 S. W. Rep. 514.

⁴ French v. Edwards, 21 Wall. 147.

⁵ Tit. 7, § 32.

⁶ Weatherford v. Weatherford, 20 Ala. 548. And see also, to like ef-

child was actually born a bastard, he taking his father's name and being treated by the parents as legitimate, where the parents live together thereafter as husband and wife, and so acknowledging and holding each other out to the world.¹ Indeed the presumption of legitimacy is so strong that it is not overcome by a mere preponderance of proof. But evidence to overthrow it must be clear, strong and convincing.² Illegitimacy cannot be established by showing from the declarations of the alleged deceased parents that the child alleged to be illegitimate was not theirs, where it is also shown that such parents had been lawfully married, and no impotency or impossibility of access on the part of the husband is shown.³ Such facts do not rebut the presumption that children born in lawful wedlock are legitimate.⁴ But testimony of the parents is competent to prove that a child was born before marriage.⁵ But whenever there is a doubt of the legitimacy all reasonable presumptions are indulged in favor of legitimacy. If it is merely doubtful whether a child be legitimate or not he will be held to be legitimate.⁶ And this presumption is so strong that it has been held not to be destroyed by proof of the fact that the child's mother was an Indian woman and its father a negro.⁷ But the presumption of legitimacy may be rebutted by evidence that the child could not, in the course of nature, be that of the alleged parents; as, for instance, the child of white parents could not be a negro.⁸ And where a question arises as to the legitimacy of a child of white parents because

fect, *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Craufurd v. Blackburn*, 17 Md. 49; *Berkley Peerage Case*, 4 Camp. 417; *Copes v. Pearce*, 7 Gill (Md.), 247; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. Rep. 752.

¹ *Jones v. Jones*, 45 Md. 144.

² *Dannelli v. Dannelli*, 4 Bush (Ky.), 51; *Vowles v. Young*, 13 Ves. Jr. 140, 145.

³ *Goodright v. Moss*, Cowp. 591; *State v. Wilson*, 10 Ired. (N. C.) 131; *Simon v. State*, 31 Tex. Cr. App. 186, 20 S. W. Rep. 399. And where it is provided by statute that a bastard child shall be deemed legitimate if a man marries its mother and acknowl-

edges it, such acknowledgment cannot be overcome by the father by proof that he did not beget the child. *Binns v. Dazy* (Ind.), 44 N. E. Rep. 644.

⁴ *Simon v. State*, 31 Tex. Cr. App. 186, 20 S. W. Rep. 716.

⁵ *Goodright v. Moss*, Cowp. 591. And see *Wilkins v. Metcalf* (Vt.), 41 Atl. Rep. 1035.

⁶ *Senser v. Bower*, 1 Pen. & W. (Pa.) 450; *Canjolle v. Ferrie*, 26 Barb. 177.

⁷ *Illinois Land & L. Co. v. Bonner*, 75 Ill. 315.

⁸ *Bullock v. Knox*, 96 Ala. 195, 11 S. Rep. 399.

the child is alleged to be of mixed blood, it is proper to permit the child to be exhibited in evidence, to the end that it may be determined from observation whether the contention be well founded or not. In such a case, if the child be found to be of mixed blood, all presumptions of legitimacy would be overcome.¹

§ 589. Proof—Presumptions—Question of fact.— While the presumption of law is always in favor of the legitimacy of children whenever the facts established are such that it is probable that the issue is legitimate, yet this presumption does not extend to issues of fact, but rather arises from the fact or facts when established. In the nature of things, there is nothing to be presumed from an unknown state of facts, and not until such facts are established as raise the legal presumption of legitimacy can it be indulged by the courts.² Upon this principle it has been held that there is no presumption of law that a woman who comes into a community calling herself Mrs. A., of whom nothing is known, and there is no person in the community known by the name of A., is married, nor that children born to her are legitimate, from such facts alone.³ But in an issue of bastardy it is not necessary to prove a formal marriage between the parents except in states where no others are valid; but proof of cohabitation, holding out and reputation of the parents is all that is necessary.⁴ Nor, where an actual marriage is shown, will proof of a former marriage from reputation and cohabitation be sufficient to bastardize the issue of the actual marriage.⁵

§ 590. Issue of marriages between white persons and Indians.— Where by statute all marriages between white persons and Indians are positively forbidden and declared void, the issue of such a marriage will be invariably held illegitimate by the courts of the state where such statute is in force. And this has been held to be true though the marriage con-

¹ Warlick v. White, 76 N. C. 175.

² Blair v. Howell, 68 Iowa, 619, 28

³ Blackburn v. Crawford, 3 Wall. N. W. Rep. 199.

175; Arnold v. Chesebrough, 46 Fed. Rep. 700; McNeely v. McNeely, 47 La. Ann. 1321, 17 S. Rep. 928.

⁴ Clayton v. Wardell, 5 Barb. 214; Hoffman v. Simpson (Mich.), 67 N. W. Rep. 1107.

⁵ Clayton v. Wardell, 5 Barb. 214.

tract be entered into by the parties while on an Indian reservation where they afterwards live in accordance with the Indian laws and customs.¹

§ 591. Issue of blacks and whites.—Where the local law declares the issue of all marriages between persons of the African and white races illegitimate, such issue can have no rights except as bastards under such laws. But if the impediment to such marriages be later removed by legislative enactment, the law will be held to relate back and legitimate the issue, if it has been recognized by the parents.² But in enacting laws governing the legitimacy of children, the legislature is supposed to have reference to those marriages which, but for some impediment, might be valid; and the case of children of parents, one of whom is black and the other white, does not come within the provisions of the general law on the question of legitimacy, because such marriages are, usually at least, contrary to the policy of the law of the state, and the issue of such an union is not legitimated by a statute providing that the issue of marriages void in law or dissolved by a decree of divorce shall nevertheless be legitimate.³

§ 592. Paternity — Evidence of.—In either a civil or a criminal proceeding where the issue is the paternity of a bastard, it is competent to show by evidence the relations existing between the parties, their acquaintance, conduct toward each other, intimacy, and like facts both before and after the time of begetting, not to show the direct act of intercourse, but to prove matters having a tendency to establish a relation which would afford opportunity or inclination therefor, or both.⁴ But in all

¹ *In re Walker's Estate* (Ariz.), 46 Pac. Rep. 67.

² *Succession of Colwell*, 34 La. Ann. 264.

³ *Greenhaw v. James*, 80 Va. 636; *Heckert v. Hiles*, 90 Va. 390, 18 S. E. Rep. 341.

⁴ *Ramey v. State*, 127 Ind. 243, 26 N. E. Rep. 818; *Gemmill v. State* (Ind. App.), 43 N. E. Rep. 909; *Francis v. Rosa*, 151 Mass. 532, 24 N. E. Rep. 1024; *Sullivan v. Hurley*, 147 Mass. 387, 18

N. E. Rep. 3; *Marks v. State*, 101 Ind. 353; *Beers v. Jackman*, 103 Mass. 192; *Commonwealth v. Lahey*, 14 Gray (Mass.), 91; *Erwin v. Bailey* (S. C.), 31 S. E. Rep. 844. Nor in such proceeding under the criminal law will the prosecutor be held to proof of the exact date upon which the child was begotten as alleged, so long as the evidence is confined within such time as, under the circumstances, is proper. *Francis v. Rosa*, 151 Mass.

cases, whether civil or criminal, the *onus* of establishing the bastardy is on the party alleging it.

§ 593. Proof of paternity — Resemblance of child and alleged parent.— It is permissible, usually, to allow the alleged child to be exhibited in evidence in order to show a resemblance to the alleged father. But this is usually in aid of other evidence, and is never regarded as conclusive evidence of the fact involved, though the resemblance be patent. Such evidence, unsupported by any other fact or circumstance tending to prove the same fact, is generally held, very properly, to be insufficient to establish the alleged paternity.¹ Such evidence may be admitted in connection with the scientific opinion of a medical expert. But even then this species of evidence is not considered reliable.² But it is also admissible to show the resemblance of the child, it is held, in corroboration of the testimony of the mother charging paternity on a certain man.³ And, as a rule, neither is the resemblance evidence of paternity, nor the lack of it evidence that the paternity does not exist.⁴ Courts more readily permit the introduction of the child in evidence when it has become two or three years old or more, for the purpose of showing a resemblance to the alleged parent, than when it is very young, as the resemblance is apt to be more striking as the child grows older and is more certain and permanent. But in no case can the evidence had by an inspection

352, 24 N. E. Rep. 1024. Nor, in a like proceeding, is it competent to prove that the woman had intercourse with other men than the one alleged to be the father ten months before the birth of the child, in the absence of any proof that the period of gestation was unusually prolonged. *Eddy v. Gray*, 4 Allen (Mass.), 435.

¹ *Eddy v. Gray*, 4 Allen (Mass.), 435; *Knowles v. Scribner*, 57 Me. 495; *Keniston et ux. v. Rowe*, 16 Me. 38; *In re Jessup's Estate*, 81 Cal. 408, 22 Pac. Rep. 742; *In re Turnbull's Will*, 51 Hun, 643, 4 N. Y. S. 607; *Young v. Makepeace*, 103 Mass. 50; *Clark v. Bradstreet*, 84 Me. 454, 15 Atl. Rep. 156; *State v. Danforth*, 48 Iowa, 43; *Hanawalt v. State*, 64 Wis. 84, 24 N.

W. Rep. 489; *Reitz v. State*, 33 Ind. 187. And, of course, the opinions of witnesses as to the supposed resemblance is incompetent. *Shorten v. Judd*, 56 Kan. 43, 42 Pac. Rep. 337; *Overlock v. Hall*, 81 Me. 348, 17 Atl. Rep. 169.

² Beck, Med. Jur., pp. 634, 635.

³ *Crow v. Jordan*, 49 Ohio St. 653, 32 N. E. Rep. 750. See *State v. Arnold*, 13 Ired. (N. C.) 184; *State v. Woodruff*, 67 N. C. 89; *Finnigan v. Dugan*, 14 Allen (Mass.), 197; *Gilmanton v. Ham*, 38 N. H. 108.

⁴ *In re Jessup's Estate*, 81 Cal. 408, 22 Pac. Rep. 742; *Eddy v. Gray*, 4 Allen (Mass.), 435; *Young v. Makepeace*, 103 Mass. 54.

of the child be considered unless there is a resemblance.¹ But such evidence is usually held competent when a question of race arises on the issue of paternity.² In Massachusetts and New Jersey it is held that the child may be introduced in evidence regardless of its age, that being only a question of weight to be accorded the evidence.³

§ 594. Right of inheritance—Statutory changes in the common law.—The law of inheritance has been materially changed in some of the states, even in reference to bastards. In Indiana a statute provided that if a man should marry a woman who had, previous to the marriage, borne him a bastard child, who after the marriage should acknowledge such child as his own, such child would be deemed legitimate to all purposes. Under this statute it was held that where a woman had a bastard child in Pennsylvania, where the child always resided and had its domicile, it would be entitled to inherit property from its father in Indiana, the father having married the mother and recognized the child, though it would be presumed that the common law was in force in Pennsylvania.⁴ In many of the states statutes regulate the adoption of children, both legitimate and illegitimate, and grant them certain rights of inheritance when adopted according to law. In such cases the adopted child takes by descent directly from the adoptive parents only, and not from the natural children of such parents.⁵ These laws, being in derogation of the common law, receive a strict construction.⁶

¹ *State v. Smith*, 54 Iowa, 101, 6 N. W. Rep. 153; *Shorten v. Judd*, 56 Kan. 43, 42 Pac. Rep. 337; *Overlock v. Hall*, 81 Me. 348, 17 Atl. Rep. 169; *Clark v. Bradstreet*, 80 Me. 454, 15 Atl. Rep. 56.

² *Garvin v. State*, 52 Miss. 207; *Clark v. Bradstreet*, 80 Me. 454, 15 Atl. Rep. 56; *Warlick v. White*, 76 N. C. 175.

³ *Scott v. Donovan*, 153 Mass. 378, 26 N. E. Rep. 871; *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. Rep. 600; *Finnigan v. Dugan*, 14 Allen (Mass.), 197.

⁴ *Harvey v. Ball*, 32 Ind. 98. But such a statute does not legitimate a child whose father, at the time of begetting it, was married to a woman

other than its mother, where the child was born during the life-time of the father's wife. *Sams v. Sams*, 85 Ky. 396, 3 S. W. Rep. 593.

⁵ *Keegan v. Geraghty*, 101 Ill. 26.

⁶ *Keegan v. Geraghty*, 101 Ill. 26, 39. Sheldon, J., speaking for the court in this case, at page 39 says: "Notwithstanding the general words that the adopted child 'shall to all intents and purposes be the child' of the adopting parents, and shall be deemed, as to the legitimate consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the

§ 595. Laws of inheritance — Conflict of laws.— The law of descent concerning property within a state is determined by the manner in which the laws of such state regard the status of parties supposed to inherit property within its bounds. So, a person who, according to the laws of the state where the property is situated, is a bastard, cannot inherit property in that state, though he has been made legitimate in every sense of the word by the laws of his *bona fide* domicile. This is the general rule where the common law is in force.¹ In harmony with this rule, it is held in Alabama that where a child is conceived in that state, but born in a foreign country, and legitimated by the laws of that country, he cannot inherit property in Alabama, since, according to the laws of that state, he is a bastard.²

§ 596. Conflict of laws — What laws control the status and right of inheritance.— The general rule is, the laws of inheritance will be controlled by the local laws of the state or country where the property to be inherited is situated, while the laws fixing the status of the person inheriting will be controlled by the laws of the state of the domicile of such person. That is, a person who is legitimate by the laws of the state of domicile is not necessarily legitimate by the laws of the state where the property he is to inherit is located. And if he is not legitimate

same as if he had been born in lawful wedlock, the right of inheritance from the child, which is given to adoptive parents by section 6, is very limited, being confined to such property as the child got from the adoptive parents; and there is, besides, an express prohibition against such parents inheriting any property from the child which it takes from his kindred by blood. Mutuality would indicate that if the parents do not inherit from the adopted child's kindred by blood, neither would the child inherit from the adoptive parents' kindred. We cannot admit this anomalous right here claimed as a stranger in blood to take by descent in exclusion of kindred, to be given by any doubtful indication or vague generality of language. As against

the adopted child, the statute should be strictly construed, because it is in derogation of the general law of inheritance, which is founded on natural relationship, and is a rule of succession according to nature which has prevailed from time immemorial." Where only those who are born in lawful wedlock can inherit as descendants and collateral kinsmen by statute, the law will not be extended by construction so as to include an illegitimate child of a legitimate brother or sister. In *re* Rees' Estate, 166 Pa. St. 498, 31 Atl. Rep. 254.

¹Story, *Conf. Laws*, § 483; *Williams v. Kimball*, 35 Fla. 49, 16 S. Rep. 783; *Ewing v. Sneed*, 5 J. J. Marsh. (Ky.) 450.

²*Lingen v. Lingen*, 45 Ala. 410.

by the laws of the place where the property is, he cannot inherit, though he be legitimate by the laws of his domicile and might inherit the same property if it were located in such place of domicile. Again, he may be an illegitimate child by the laws of domicile, and yet legitimate and capable of inheriting by the laws of the place where the property is. And if he is so legitimate under the laws of the *locus* of the property to be inherited, he will take the property by descent, though he could not do so if the property were in the state of domicile. Upon this principle it is held, where the local laws provide that the issue of a marriage deemed null in law shall nevertheless be legitimate, such child might inherit property in the jurisdiction of the same, though born in another state where by law it is a bastard and has no right of inheritance.¹ But the laws of one state conferring or denying legitimacy have no extraterritorial force. One state is in no sense bound to recognize the legitimacy of a person who, by its laws, is a bastard, though by the law of some other state he may be legitimate.²

§ 597. Right of inheritance — Conflict of laws — Right of one to inherit in jurisdictions where he is not legitimate though he be so in the place of domicile.—The rule that a person can inherit property only when he can bring himself within the laws of the state of the *locus* of the property is not by any means universally recognized. Indeed, the idea is vigorously combatted in some countries where the common law prevails. The doctrine is stoutly denied in New York and Massachusetts,³ where it is held that a person made legitimate by the laws of any country having jurisdiction over the person becomes legitimate for every purpose in all jurisdictions. This, it is true, is the general rule, and may, perhaps, on principle at least, be regarded as the universal rule where the public policy or positive law of a state is not invaded by such laws

¹ Harris v. Harris, 89 Ky. 49, 2 S. W. Rep. 549; Leonard v. Braswell (Ky.), 36 S. W. Rep. 684; In re Walsch's Estate, 166 Pa. St. 204, 30 Atl. Rep. 1124; Doe v. Vardill, 5 Bar. & Cr. 438; Williams v. Kimball, 35 Fla. 49, 16 S. Rep. 783. See also Smith v. Derr's Adm'r, 34 Pa. St. 126.

² Ewing v. Sneed, 5 J. J. Marsh. 459.

³ Miller v. Miller, 91 N. Y. 315; Ross v. Ross, 129 Mass. 243. A comparatively recent case in New Jersey has also followed the doctrine of these cases. Dayton v. Adkisson, 45 N. J. Eq. 602, 17 Atl. Rep. 964.

conferring legitimacy. As to the right of inheritance of property within a state, such state certainly possesses the power and authority to prescribe laws by and under which that property may descend, and may preclude any other mode or law of descent. When this is done, the bastard who has been legitimated in a foreign country or state, but who is still a bastard, and precluded, by reason of such fact, from inheriting property within the state where the same may be situated, it would seem to be proper to hold that such bastard cannot inherit property in the state of the *locus* of the property. If he could do so, it would be tantamount to permitting a foreign state or country to dominate, in a sense, the policy of a state with respect to the right of inheritance of property within the jurisdiction exclusively of the courts of such state, and impose on such courts the duty of bowing in obedience to the laws of a foreign country enacted in positive and hopeless conflict with the laws of the place of the property. Property within a state is under the dominion and control of the laws of such state. No laws of a foreign state can have the extraterritorial force claimed by the rulings which confer upon a bastard the right to inherit property in a state in which he is not recognized by law as a legitimate person capable of inheriting. The policy of a state in this respect may be based on the idea that it is best for all the citizens of the state that bastards, as defined by law, shall have no rights within such state not conferred by the laws of that state. If such be true, it would certainly seem reasonable to conclude that no other state would have the right to dominate a different course or public policy. A foreign state could no more do this than it could say that property situated in another state shall not be taxable in such state because the owner may live in a different state. Were this the case, one state could seriously interfere with the revenue, and incidentally the machinery, of the state government of another, a thing which no state would, for an instant, tolerate. The property is subject to taxation in the state of its location. It is, upon analogy and reason, likewise subject to the laws of descent of such state. That the authorities are far from harmonious on this point must be conceded, and that there is forcible argument to the contrary is also frankly admitted. But it seems that the better reason sustains this contention.

§ 598. **Issue of slave marriages.**— It is generally held that those born of parents while in a state of slavery are bastards, as the state of bondage precludes the husband and wife yielding to each other the duty, fealty and protection that the law requires. This being true, there can be no lawful marriage in such cases, and it naturally follows, no lawful issue.¹ But the laws enacted in most or all of the southern states shortly after the civil war changed the status of parties born of slave marriages, and these enactments were directed to legitimating such issue as far as practicable and expedient. In Tennessee, for instance, it was enacted that “all free persons of color who were living together as husband and wife in this state, while in a state of slavery, are hereby declared to be man and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired or that may be hereafter acquired by said parents, to as full an extent as the children of white citizens are now entitled by the existing laws of this state.”²

In South Carolina a statute was passed in 1865 declaring that “every colored child heretofore born is declared to be the legitimate child of its mother and also of his colored father, if he is acknowledged by such father.” Under this act it was held that the children of a colored man who had two wives, the marriage to the first having been held valid, were legitimate, the father having acknowledged them to be his children

¹ *Andrews v. Simmons et al.*, 68 Miss. 732, 10 S. Rep. 65; *Howard v. Howard*, 6 Jones (N. C.), 235; *Butler v. Butler* (Ill.), 44 N. E. Rep. 203; *McReynolds v. State*, 5 Cold. (Tenn.) 18; *Williams v. Kimball*, 35 Fla. 49, 16 S. Rep. 788; *Harris v. Cooper*, U. C. Q. B. 182; *McDowell v. Sapp*, 39 Ohio St. 558.

² Acts Tenn., May 26, 1866. Under this act it was held in the case of *McReynolds v. State*, 5 Cold. (Tenn.) 18, that children born of a marriage contracted in slavery, where one of the parties died before the emancipation proclamation, were not legitimated by the act. But this case was

shaken, if not overruled, on this point, in the later case of *Andrews v. Page*, 8 Heisk. (Tenn.) 653, wherein it was held that children of such a marriage would be entitled to legitimacy, though one of the parents had died in slavery. And this later ruling received sanction in the case of *Wallace v. Godfrey*, 42 Fed. Rep. 812. And the issue of a slave marriage will be deemed illegitimate, though there may have been legislation validating all slave marriages, where one of the parties to the marriage died before the passage of the law. *Andrews v. Simmons*, 68 Miss. 732, 10 S. Rep. 65.

while they were slaves.¹ In Kentucky it was held in a case where a negro man and woman were married in 1854, and lived together as husband and wife until 1885, that the issue of such marriage was valid, though the husband had another negro child by another negro woman whom he recognized as his, but had never cohabited with such woman or recognized

¹ *Knox v. Moore*, 41 S. C. 355, 19 S. E. Rep. 683. In this case the court, per Pope, J., among other things, said: "The seeming inconsistency involved in holding that certain of Rindy's children could inherit as legitimate heirs at law of Thornton, although no marriage subsisted between Thornton and Rindy, their mother, will disappear when it is remembered that the legal status of such children did not arise in law from the fact of being born to Thornton and Rindy while slaves, but really such legal status was the creature of the statute. . . . When Thornton therefore acknowledged certain children born to him by Rindy, while they were slaves, to be his children, he thereby made such children his legal heirs under the statute." Again, the legislature of this state in 1872, to further promote legitimacy and avert the confusion incident to any uncertainty of the law on this subject, passed another law touching the issue of these marriages. By section 1 it is provided: "All persons in the state of South Carolina who, previous to their actual emancipation, had undertaken and agreed to occupy the relation to each other of husband and wife, and are cohabiting as such, or in any way recognizing the relation as still existing at the time of the passage of this act, whether the rites of marriage have been celebrated or not, shall be deemed husband and wife and be entitled to all the rights and privileges and be subject to all the duties and obligations of that relation in like manner as if

they had been duly married according to law." And by section 2 it is enacted: "And all their children shall be deemed legitimate whether born before or after the passage of this act; and where the parties have ceased to cohabit before the passage of this act, in consequence of the death of the woman or from other cause, all the children of the woman, recognized by the man to be his, shall be deemed to be legitimate." And it was held under this statute that the issue of slaves who went through the forms of marriage customary with them and lived together as husband and wife until the death of one of the parties, though such death took place before the emancipation, would not thereby be invalidated, and could inherit as others lawfully born. *Davenport v. Caldwell*, 10 S. C. 500; *Dingle v. Mitchel*, 20 S. C. 202; *Meyers v. Ham*, 20 S. C. 522; *James v. Mickey*, 26 S. C. 270, 2 S. E. Rep. 130; *Clement v. Riley*, 33 S. C. 66, 11 S. E. Rep. 699. But this act did not have the effect of legitimizing the issue of an occasional illicit connection. As expressed by the court, "We cannot think that it was the intention of any or all the acts aforesaid to attempt the impracticable thing of legitimizing the whole colored race, without the least regard to the circumstances under which they were born, including the offspring of mere concubinage." *Clement v. Riley*, 33 S. C. 66, 11 S. E. Rep. 699. See also *Woodward v. Blue*, 103 N. C. 109, 9 S. E. Rep. 492.

her as his wife.¹ But a person otherwise a bastard can only inherit property which he becomes entitled to under a statute and after its enactment. The law does not relate back to the time of his birth and permit him to take property which he could have inherited had the law been in force sooner, but which, before the passage of such law, had become vested in some other person by operation of some previous law.²

§ 599. **Issue of slave marriages — Curative acts.**—The curative acts, whereby it was declared that all colored persons who had lived together as husband and wife while in slavery should be regarded in law as man and wife, and their issue legitimate and capable of inheriting, did not reach a marriage where a slave had separated from his wife without the consent of his master and taken up with another woman as his spouse. This is true because in slavery he could not contract marriage without the consent of the master, and for the same reason could not renounce it without such consent.³ Likewise, where persons are born of a slave marriage which becomes void by reason of the separation of the parties before emancipation, or before the enactment of the curative legislation on the subject, they are bastards under the law of inheritance; and this is true though they may have been legalized by a proceeding in a foreign country not recognized by the laws of the *locus* of the property to be inherited.⁴

§ 600. **Indian marriages.**—As to the children of Indian marriages, celebrated between the Indians in conformity to their laws, those laws must prevail when the validity of such marriages and the legitimacy of the children thereof are brought in question in any of the courts of the several states. That is, while the tribal relations of the Indians continue and they are recognized by the federal government as Indians in

¹ *Washington v. McCombs* (Ky.), 32 S. W. Rep. 398. See also, as holding substantially similar doctrine, *Brown v. Cheatham*, 91 Tenn. 97, 17 S. W. Rep. 1033; *Schwarz v. Allen* (Tex. Civ. App.), 37 S. W. Rep. 98; *Downs v. Allen*, 10 Lea (Tenn.), 66.

² *Powell v. Conn*, 88 Ky. 698, 11 S.

W. Rep. 814. And see *In re Jessup's Estate*, 81 Cal. 408, 22 Pac. Rep. 742.

³ *Brown v. Cheatham*, 91 Tenn. 97, 17 S. W. Rep. 1033.

⁴ *Williams v. Kimball*, 35 Fla. 49, 16 S. Rep. 783. See, too, *Butler v. Butler*, 161 Ill. 451, 44 N. E. Rep. 203.

the tribal state, the issue of such marriages will be held legitimate in the state courts for the purposes of inheritance, and in fact for general purposes, if the marriage was valid and binding according to the forms, laws and customs in force among the Indians themselves.¹ The Indians, so long as they maintain their tribal relations to each other and the balance of the world, and are so regarded by the general government, are in a sense foreign subjects, and their marriages are upheld upon the same principle that a marriage of subjects of a foreign country, valid according to the laws to which such subjects owe fealty, is valid everywhere and the issue is legitimate. Nor will the fact that, by reason of the advance of civilization, or for other cause, the Indians have much modified their primitive habits and inclinations, alter the rule in any sense.² Of course, on the other hand, if the marriage be void or the issue illegitimate according to the laws of the Indians in such cases, bastardy would follow in all jurisdictions.

§ 601. Proof of — Period of gestation.— The average time of gestation in human beings is shown by experience and observation, as well as by the teachings of medical science, to be from thirty-nine to forty weeks; and it being very rare that cases are found wherein this period extends over three hundred days, it is fairly safe to conclude that, when the period is longer than this, it is apt to be either a case of miscalculation or deceit.³ Difficulties sometimes occur in ascertaining legitimacy where the wife marries again a short time after the death of her husband. As the child could be born alive in five months after conception and live to maturity in seven months thereafter, but may not be born for ten months or more, it is clear that issue might be the offspring of either husband where the second marriage should occur very soon after the death of the first husband. The Roman law endeavored to prevent such a state of things by forbidding females to marry within ten months after the death of a husband. A case of some interest in this respect occurred in Naples. One Antoine, forty years of age, married a young lady, and two days afterwards fell a

¹ *Earl v. Godley*, 42 Minn. 361, 44 N. W. Rep. 254. sioners, 5 Wall. 737; *Earl v. Godley*, 42 Minn. 361, 44 N. W. Rep. 254.

² *Blue Jacket v. Board of Commis-* ³ Beck, Med. Jur. 607-631.

victim to the plague which was raging in that city. Amello, an intimate friend of the widow, married her immediately afterwards. She bore a child two hundred and seventy-three days after the first marriage, and two hundred and sixty-eight days after the second. A question arose as to the paternity of the child, and to ascertain this, the physical condition of the two husbands was looked to. The first was feeble, and the marriage was contrary to the wishes of the female; the second husband was vigorous and strong. The wife testified that the consummation of the first marriage was attended with a discharge of blood, which she attributed to menstruation, and that in the short interval of her widowhood it had slightly returned, but never after her second marriage. It was decided, however, that this sanguineous discharge was in consequence of defloration, and that, as she received the advances of her first husband with disgust, the suppression might arise from mental uneasiness. No importance was attached to the fact that, if the child was the issue of the second husband, the period of pregnancy would fall short of nine months, and it was decided that this was amply counterbalanced by the youth of the parties as well, perhaps, as the congeniality of the parties to the second marriage.¹ In all such cases the issue must be tried as any other question of fact. But where there has been no second marriage, and the child is born within the time in which it might be born, though before the usual period, it will be presumed the legitimate child of the father.²

Not only is the knowledge of the period of gestation necessary in arriving at a correct conclusion, as far as possible, when children are born before the full time, but it may become necessary in some instances to inquire what is the longest probable or possible duration of the period. Some interesting cases of this kind are recorded. It is said the Emperor Adrian declared a child legitimate which was born eleven months after the death of its father. The conclusion was reached partly from medical science and partly from the exceptional character for purity and virtue of the widow. Godfrey, in his notes on the novels of Justinian, mentions the case of a widow who was

¹ Beck, Med. Jur. 632, 633.

was born one hundred and eighty

² Harrington v. Barefield, 30 La. Ann. 1297. In this case the child

days after the marriage.

delivered fourteen months after the death of her husband, and the issue was pronounced legitimate by the parliament of Paris. In this particular case the widow had lived with the relatives of her husband the whole period of her widowhood, had always manifested deep grief because of the loss of her husband, and her conduct all the while was shown to have been above reproach. This same parliament appears to have adjudicated numerous cases sustaining legitimacy where the period of gestation was from twelve to sixteen months' duration. In most or all of these instances much stress was put upon the irreproachable character of the females, which was well established. A case is mentioned of a young girl at Leipsic, who, upon making an accusation against an alleged seducer, was confined and strictly guarded. After the end of sixteen months she was delivered of a child which lived only two days. The faculty of Leipsic, however, in one case declared a child illegitimate which had been born eleven months after the father's death because the period was beyond that laid down by Hippocrates. But without multiplying cases, in some of which the period of gestation is reported to have lasted twenty or more months, it is sufficient to say that instances of such protracted gestation are exceedingly doubtful of a real existence. Among the forcible arguments against such a contention are: "The laws of nature on this subject are immutable; that the *fœtus* at a fixed period has received all the nourishment of which it is susceptible from the mother, and becomes, as it were, a foreign body; that married females are very liable to error in their calculations; that the decisions of tribunals in favor of protracted gestation cannot overturn a physical law; and finally, that the virtue of females in these cases is a very uncertain guide for legal decisions."¹ And the fact that a child is born to a woman whose husband has only had access to her within seven or eight months is not necessarily evidence of illegitimacy; children born before the full time "differ in size, general appearance, apparent maturity, etc." And the fact, therefore, that a

¹ Beck, Med. Jur. 604-606. This learned writer lays down the recognized general period of gestation to be ten lunar months or forty weeks. The period is sometimes stated to be nine calendar months or thirty-nine weeks, a difference of a few days being very common. Beck, Med. Jur. 595, 596.

child is born within seven or eight months does not show illegitimacy for this reason. It is a fact gleaned from the field of medical jurisprudence that children born within eight months after conception have been known to be larger and healthier than those born at nine. It is not safe, therefore, to place too much importance in the size or appearance of a child so born.¹ It is a fact, furthermore, that there is a disposition in some females to expel the child before the ordinary term. This occurs sometimes as soon as the seventh month.²

§ 602. Legitimacy — Proof of — Non-access.—It is clear that, according to the very order of nature, there can be no legitimacy without access of the husband. In all ordinary cases of husband and wife living together, no impotency or impediment being shown, access is conclusively presumed in law, and children of the union, by the same presumption, are deemed in every sense legitimate.³ The question of access has received consideration and discussion in the most learned courts. In a case where the husband was living in a distant country, and the wife living in a state of adultery with another at the period of conception, it was held by the House of Lords that in any view of the facts there could, in such a case, be no possible presumption of legitimacy.⁴ Where a husband and wife had lived together for ten years, having one child born unto them within the period, and who then separated by mutual agreement, afterwards living apart, but near enough to each other to afford ample opportunity for access, it was held that any children born to the woman after such separation would be presumed legitimate; but that this presumption, however, was overcome not only upon a showing by direct evidence that the husband had not had access, but by the facts that the wife, after separation, lived in adultery; that she concealed the birth of a child from the husband, and assured him that none had been born; that the husband denied any knowledge of the child having been born, and demeaned himself up to the time of the death of the child as though it was not in existence, and that the wife's para-

¹ Beck, Med. Jur. 605.

720; Woodward v. Blue, 103 N. C. 109, 9 S. E. Rep. 492.

² Beck, Med. Jur. 603.

³ 1 Greenl. Ev., § 28; Mink v. State, 60 Wis. 583, 19 N. W. Rep. 445; Watts v. Owens, 62 Wis. 512, 22 N. W. Rep.

⁴ Barony of Saye and Sele, 1 H. L. 507; The Townshend Peerage, 10 C. & F. 289; Rex v. Maidstone, 12 East, 550.

mour had aided in concealing the child from the husband, had raised and educated it, and left it all his property at his death.¹ This case will serve to illustrate the fact that the presumption of legitimacy is never absolutely conclusive, and must always yield to facts affirmatively proven which are incompatible with the presumption. But it is rarely or never that access can be shown by direct evidence where the evidence of the husband or wife is requisite to prove the fact, especially if either were concerned as a party, as neither could then testify. The access or non-access may be shown by circumstances leading to the necessary inference that it did or did not take place.² But the law regards the rights of legitimate children with such sacred anxiety that nothing short of proof such as will establish their legitimacy or want of access beyond a reasonable doubt will be sufficient.³ A most respectable line of authorities holds that it must be shown that it was impossible that the husband could be the father of the child before the presumption of the legitimacy of a child born in lawful wedlock can be overcome.⁴

“Although actual adultery with other persons is established, at or about the commencement of the usual period of gestation, yet if access by the husband has taken place, so that by the laws of nature he may be the father of the child, it must be presumed to be his.”⁵ And this presumption lingers to protect the child from illegitimacy, though born eight months after the marriage; it has all the physical appearances of a child fully developed, and the mother declares that she had no con-

¹ *Morris v. Davis*, 5 C. & F. 163.

² *Hawes v. Draeger*, L. R. 23 Ch. Div. 173; *Regina v. Mansfield*, 1 Q. B. 444.

³ *Phillips v. Allen*, 2 Allen (Mass.), 453.

⁴ *Cross v. Cross*, 3 Paige, 139; *Patterson v. Gaines*, 6 How. (U. S.) 550, 589; *Rex v. Luffe*, 8 East, 207; *Bowles v. Bingham*, 2 Munf. (Va.) 442. And this is doubtless the correct doctrine. In the last case it was held that the declarations of a husband that the issue was not his, the child being born in wedlock, are not sufficient to prove illegitimacy, notwithstanding its birth occurred only three months

after the marriage, and the husband and wife thereafter soon separated by consent. In *Cross v. Cross*, 3 Paige, 139, the court, at page 140 *et seq.*, say: “Sexual intercourse is to be presumed where personal access is not disproved, unless such presumption is rebutted by satisfactory evidence to the contrary; and where sexual intercourse is proved or presumed, the husband must be taken to be the father of the child, unless there was a physical or natural impossibility that such intercourse should have produced such child.”

⁵ *Cross v. Cross*, 3 Paige, 139.

nection with her husband before marriage; that she was a lewd woman at the time of her marriage, and for months previous thereto had been intimate with other men.¹

It was once held in England that if the husband was within the four seas, that is, within the jurisdiction of the British courts, during the full period of gestation, the issue of the marriage would be conclusively presumed to be lawful.² But this doctrine is not regarded as sound at this time, and positive proof of non-access of the husband, though he may all the while have been within the realm, is sufficient to bastardize the issue.³ And the doctrine of these later cases finds approval in the courts of this country.⁴ Indeed, proof of any fact which will show to the certainty required by the rules of evidence that the husband, in the nature of things, is not and could not be the parent, will suffice to establish illegitimacy. This is but common sense, were there no authority to support it.⁵ In all cases where the question of access of the husband becomes one of fact, it is proper to admit in evidence any facts or circumstances which show it to be impossible that the alleged father is the real parent.⁶ But where access of the husband, or facts from which the law will presume access, are shown, nothing short of proof of impotency in the husband, such as would make it impossible for him to be the father of the child, will repel the presumption of access and paternity in the husband where the child is born in lawful wedlock.⁷ The law never lends its sanction to improbabilities in order to establish bastardy; and even evidence of continuous adulterous intercourse with other men will not be permitted in evidence where access, or the possibility thereof on the part of the husband, is established.⁸

¹ *Phillips v. Allen*, 2 Allen (Mass.), 453.

² *Reg. v. Murrey*, 1 Salk. 122; Co. Litt. 244a; 1 Bl. Comm. 457.

³ *Pendrell v. Pendrell*, 2 Str. 924; *Rex v. Bedall*, 2 Str. 1076; *Morris v. Davis*, 5 C. & F. 163; 1 Bl. Comm. 457; *Goodright v. Saul*, 4 T. R. 356; *Head v. Head*, 1 Sim. & Stu. 150.

⁴ *Wright v. Hicks*, 12 Ga. 165; *Woodward v. Blue*, 107 N. C. 407, 12 S. E. Rep. 453.

⁵ *Goodright v. Saul*, 4 T. R. 356; *Pendrell v. Pendrell*, 2 Str. 924; *Goss*

v. Froman, 83 Ky. 318, 12 S. W. Rep. 387.

⁶ *Rex v. Luffe*, 8 East, 193; *State v. Herman*, 13 Ired. (N. C.) 502, 504; *State v. Wilson*, 10 Ired. (N. C.) 131, 136; *State v. Goode*, 10 Ired. (N. C.) 49; *State v. Patton*, 5 Ired. (N. C.) 180, 186; *Commonwealth v. Shepherd*, 6 Bin. (Pa.) 283; *Goss v. Froman*, 89 Ky. 318, 12 S. W. Rep. 387.

⁷ *Commonwealth v. Shepherd*, 6 Bin. (Pa.) 283.

⁸ *Bury v. Philpot*, 2 M. & K. 349. In a case where the mother and al-

§ 603. Proof of access by the parents.—It is contrary to the policy of the law, especially in a criminal or *quasi*-criminal case, for the father or mother, being married to each other, to testify that they did not have access to, or sexual intercourse with, each other, in order to sustain a plea of illegitimacy. This is forbidden, because the law conclusively presumes that those married are the parents of the issue unless it be shown that the husband was absent for the fullest period of gestation, or that he was impotent, or for some other reason absolutely unable to have sexual intercourse with his wife. The rule is based “upon the very highest grounds of public policy, decency and morality.”¹ But it has been held that it is competent to prove by the mother that the child was born several years before her marriage with its alleged father, and that the real father was some one else.²

§ 604. Reason of the rule forbidding proof of non-access by parties to the marriage.—The reasons why a parent will not be heard in a court of justice to give evidence bastardizing the issue of the marriage are many, and all are well founded. The consensus of all the reasons may be said to be that delicate and sensitive public policy which forbids the indecency and scandal incident to such evidence and its consequences. That a parent may be heard to say that he or she is not the father or mother of a child born in lawful wedlock is at once

leged father had been married and cohabited together for several months, but afterwards parted, the husband remaining in London and the wife going to Staffordshire, the child not having been born until three years after the separation, and there being doubt from the evidence whether the husband had had access within the year before the child's birth, Lord Raymond was of the opinion that it was proper for the jury to determine whether there had been access, and if not, bastardy of the child must necessarily follow. *Pendrell v. Pendrell*, 2 Str. 924.

¹ *Mink v. State*, 60 Wis. 583, 19 N. W. Rep. 445; *Watts v. Owens*, 62 Wis. 512, 22 N. W. Rep. 720; *Scanlon*

v. Walshe, 81 Md. 118, 31 Atl. Rep. 498; *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. Rep. 654; *Craufurd v. Blackburn*, 17 Md. 58; *Page v. Denison*, 29 Pa. St. 420; *Haworth v. Gill*, 30 Ohio St. 627; *Tioga County v. South Creek Tp.*, 75 Pa. St. 433; *Goodright v. Moss*, Cowp. 594; *Parker v. Way*, 15 N. H. 45; *State v. Wilson*, 10 Ired. (N. C.) 131; *Davis v. Houston*, 2 Yeates (Pa.), 289; *Miller v. Anderson*, 43 Ohio St. 473, 3 N. E. Rep. 605; *State v. Herman*, 13 Ired. (N. C.) 502; *Kleinert v. Ehlers*, 38 Pa. St. 439; *McDonald's Appeal*, 147 Pa. St. 527, 23 Atl. Rep. 892.

² *McDonald's Appeal*, 147 Pa. St. 527, 23 Atl. Rep. 892.

shocking to every sense of refinement, and if the policy of the law tolerated such testimony a father could shield himself, by his evidence, of the legal duty to support his infant child, or a mother could, by her evidence, do the very same thing. The father or mother could deprive their child of every comfort and advantage of a pure home and faithful parents and consign it to the cold world helpless and forsaken, burdened with the most odious and mortifying disgrace and shame. "It must be of very dangerous consequences," said Lord Hardwicke, "to lay it down in general that a wife should be a sufficient sole evidence to bastardize her child and to discharge her husband of the burden of its maintenance."¹ Nor does it make any difference as to the presumption of law or rule of evidence that the child was begotten out of wedlock. If born within wedlock it is just as much against the policy of the law to permit such evidence as though it was both begotten and born in lawful matrimony.² "This rule is established, independently of any possible motives of interest in the particular case, upon principles of public policy and decency."³

§ 605. Duty of parent to support.—At common law there is no obligation on the part of the parent to support a bastard child. It being *nullius filius*, no one is under legal obligations to maintain or care for it, as it is supposed to have no parents. It could not buy food or other necessities of life, however much needed, and fix a liability therefor upon the parent. And in all instances, where there is no statutory law on the subject, this rule must govern where the common law is in force.⁴ In Arkansas, by statute, the father of a bastard child is bound to

¹ In re Lee, *t. Hard.* 83.

² State v. Wilson, 10 Ired. (N. C.) 131; Page v. Dennison, 29 Pa. St. 420; Miller v. Anderson, 43 Ohio St. 473, 3 N. E. Rep. 605; State v. Herman, 13 Ired. (N. C.) 502.

³ Phil. Ev. 87; Miller v. Anderson, 43 Ohio St. 473, 3 N. E. Rep. 605.

⁴ Vetten v. Wallace, 39 Ill. App. 390; Rohrheimer v. Winters, 126 Pa. St. 253, 17 Atl. Rep. 606. It is held in Pennsylvania, however, under the peculiar laws of that commonwealth,

which are not generally in force elsewhere, that a putative father is liable to the mother of a bastard on an agreement to pay her money for its support in consideration of her agreement not to prosecute him for fornication under the local law. Rohrheimer v. Winters, 126 Pa. St. 253, 17 Atl. Rep. 606; Stumpf's Appeal, 116 Pa. St. 33, 8 Atl. Rep. 866. See also Davis v. Herrington, 53 Ark. 5, 13 S. W. Rep. 215.

contribute to its support.¹ And, this being true, the legal liability imposed on the father by such statute is held a sufficient consideration to uphold his agreement with the mother to do this.²

§ 606. Status of children made legitimate, otherwise bastards; by operation of law.—Where a child who would be illegitimate but for some saving provision in the law, as where the law provides that an illegitimate child becomes legitimate upon the marriage of its parents, or where, by statute or other law, illegitimate children may become lawful heirs and children by certain proceedings required to be had for the purpose, such child, when brought within such requirements of law, becomes a child in every sense of the word — may inherit and transmit inheritance ascending and descending, and may inherit from and transmit inheritance to collateral kindred in like manner and with as complete effect as if born in lawful wedlock.³ In New Mexico it is provided by statute that “natural children, in the absence of legitimate, are heirs to their father’s estate in preference to the ascendants, and are direct heirs to the mother if she die intestate.”⁴ Under this statute it is held that illegitimate children inherit from the father just as legitimate children, when there are no legitimate children to inherit.⁵

§ 607. Status of persons born out of lawful wedlock — Statutory changes in the common law.—In many of the states at the present day statutes are enacted legitimating the issue of all marriages, whether the marriage itself be lawful or not. This is for the purpose of shielding unfortunate children from the disgrace attending illegitimacy, and the courts look favorably upon such statutes, giving them a liberal construction in order to uphold the legitimacy of such children. Under statutes of this kind it is held that the children of a marriage between parties, one or both of whom, at the time of the birth

¹ 7 Sand. & H. Dig., § 446.

² Davis v. Herrington, 53 Ark. 5, 13 S. W. Rep. 215.

³ Swanson v. Swanson, 2 Swan (Tenn.), 459; McKamie v. Bakersville, 86 Tenn. 459, 7 S. W. Rep. 194; Gar-

land v. Harrison, 8 Leigh (Va.), 368;

Butler v. Elyton L. Co., 84 Ala. 384, 3 S. Rep. 675.

⁴ Comp. Laws New Mexico, § 1435.

⁵ Naeglin v. De Cordoba, 19 Sup. Ct. Rep. 34.

of such child, had a husband or wife living undivorced, would nevertheless be entitled to all the rights and privileges as well as the name of legitimacy.¹

§ 608. Persons born in wedlock, but conceived before — Status of.— Where a person is born in wedlock, the presumption of law with reference to his legitimacy is the same whether he be begotten in lawful wedlock or not. And this presumption is so unbending that it extends to children begotten by another than the father, if the father married the mother knowing her to be pregnant by a stranger, though he may never have had access to the mother until the marriage. Marrying her in such a condition with full knowledge of the facts, the law imposes upon him the paternity of the child — a status he has tacitly imposed upon himself by his marriage with this knowledge. And the child will be entitled to all the rights, benefits and privileges from this strange father, as it were, that a legitimate child would, and such father by marrying the mother takes upon himself the same obligation to support, maintain and care for the child in such a case to the same extent as though the child were conclusively and unquestionably his own, begotten and born in lawful wedlock.²

§ 609. Conflict of laws — Children born out of lawful wedlock.— There is no difficulty in fixing the status with regard to legitimacy of children who are born in lawful wedlock, but a bastard may be legitimate in one country and not in another. The whole civilized world recognizes all children born in wedlock as *prima facie* legitimate, and entitled to all the legal and gen-

¹ Watts v. Owens, 62 Wis. 512, 19 N. W. Rep. 445; McCalla v. Bane, 45 Fed. Rep. 828; Rev. Stat. Texas (1895), art. 1699. In Mississippi authority to make bastards legitimate is lodged in the chancery courts. Code Miss. (1892), § 492.

² State v. Shoemaker, 62 Iowa, 343, 17 N. W. Rep. 589; Miller v. Anderson, 43 Ohio St. 473, 3 N. E. Rep. 605. See also, on this point, Rhyne v. Hoffman, 6 Jones, Eq. (N. C.) 335. In Louisiana the local law provides that

where a man in whom there is no impediment to marriage, in good faith marries a woman, who at the time has a living and undivorced husband, which fact is unknown to him, the children of such marriage will nevertheless be held in law to be legitimate and capable of inheriting to the like extent that lawful heirs might. Gaines v. Hennen, 24 How. (U. S.) 553; Gaines v. New Orleans, 6 Wall. 642.

eral rights and privileges as such.¹ The real difficulty, however, lies in correctly ascertaining the legal status of a child who has not been born in lawful wedlock. By the common law all who are born out of wedlock are bastards, and even the subsequent marriage of the parents will not remove the taint of illegitimacy.² This rule of the common law is well illustrated in the leading case of *Birthwhistle v. Vardill*,³ in which it was held by the House of Lords that a child which had been born in Scotland of Scotch parents living and domiciled in that country, which parents at the time of the birth of such child were unmarried, but who intermarried afterwards in that country, though the child thereby became legitimate according to the laws of Scotland, must nevertheless be deemed to be a bastard in England, where such marriages did not have the effect of legitimating the issue. Said Lord Chief Justice Tyn-dall in this case: "We hold it to be a rule or maxim of the law of England, with respect to the descent of land from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule *juris positivi*, as are all the laws which regulate succession to real property, this particular rule having been framed for the direct purpose of excluding in the descent of land in England the application of the rule of the civil and canon law by which the subsequent marriage of the father and mother was held to make the son born before marriage legitimate; and that this rule of descent, being a rule of positive law annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born." And the status of a child with reference to its right to be legitimated by the subsequent marriage of its parents depends wholly upon the status of the putative father, not that of the mother. It is accordingly held that, where the putative father has his domicile in England, no subsequent change of domicile by the father can render the child legitimate, though the legitimacy might follow by the marriage of the father to the mother under the laws

¹ *Strode v. McGowan*, 2 Bush (Ky.), 621; *Weatherford v. Weatherford*, 20 Ala. 548; *Hynes v. McDermott*, 91 N. Y. 451; *Hynes v. McDermott*, 10 Daly, 423. ² *Stevens v. Sullivant*, 5 Wheat. 207; *Hartinger v. Ferring*, 24 Fed. Rep. 15. ³ 7 C. & F. 895.

of some other country where this effect on the issue born out of wedlock is recognized. The legitimation by the parties afterwards marrying in such other country would have no extraterritorial effect so far as the laws of England are concerned.¹ And even under those laws recognizing the legitimacy of children by the subsequent marriage of the parents, there is no presumption that the husband marrying the mother is the father of the bastard child, though by the marriage he becomes legitimate, capable of inheriting, and entitled to the protection and privileges of a legitimate heir.² And in order to have the effect of legitimating the issue, the subsequent marriage must be a lawful and not an unlawful one.³

§ 610. Conflict of laws — Status of children not born in lawful wedlock who are afterwards legitimated by the laws of the domicile of origin.— Where an infant is a bastard because not born in lawful wedlock, but by regular proceedings under the laws of the place of domicile he is made legitimate to like effect as though he had been so from birth, all of which is effected during the residence of himself and parents in the state of original domicile, this will operate to make him legitimate everywhere. At least it has been held that his status thus fixed by positive law in good faith by the laws of the state of his nativity as well as the domicile of his parents will attend him in whatsoever country he may go, and he will be entitled to inherit from his father accordingly.⁴

¹ Undy v. Undy, 1 Sc. Div. & App. 441; Doe v. Vardill, 5 Bar. & Cr. 438; In re Wright, 2 K. & J. 595. The same rule has been laid down in this country. Lingen v. Lingen, 45 Ala. 410; Smith v. Derr's Adm'rs, 34 Pa. St. 126; Keegan v. Geraghty, 101 Ill. 26; Williams v. Kimball, 35 Fla. 49, 16 S. Rep. 783.

² McDonald's Appeal, 147 Pa. St. 527, 23 Atl. Rep. 892.

³ Adams v. Adams, 154 Mass. 290, 28 N. E. Rep. 260.

⁴ Scott v. Key, 11 La. Ann. 232. In this case the child and father were *bona fide* citizens of Arkansas. While such, the legislature of this state

passed a law conferring upon the child all the rights, privileges and immunities of legitimacy. Afterwards the child went to Louisiana, when the question of his right to inherit from his father arose. It will be noticed at once that this case is not in harmony with the English rulings, and conflicts also with the decisions in other states; but is accounted for, no doubt, on the theory that the civil law is in force in Louisiana, and such laws are not repugnant to the laws of that state for this reason: because the civil law recognizes the legitimacy of children where the parents afterwards marry, while the pol-

§ 611. Bastardy — Conflict of laws — Status of those who are illegitimate by the laws of the domicile of origin.— As the courts do not, generally speaking, recognize the legitimacy of persons for the purposes of inheritance who are not legitimate according to the laws of the *situs* of property inherited, so they do not recognize the legitimacy of children who by the law of the domicile of origin are not legitimate. Such children do not take on legitimacy by leaving their country and going to another, where, had they been born under the same circumstances that attended their birth in the domicile of origin, they would have been legitimate. The stigma of illegitimacy thus branded by the home laws attends the unfortunate where-soever he may go.¹

§ 612. Conflict of laws — Divorce.— Children born of a marriage in one country which is not recognized as valid in another by reason of a difference in the laws of divorce of the two countries are not recognized as heirs by the laws of the country where the marriage was forbidden, though by the laws of the domicile the marriage was legal.² This ruling takes its force from the principle that no state or country will permit another to enact laws which must be followed everywhere. There is potent reason for this rule. Were this not the case, the citizens of one state might be living under and entitled to the privileges and protection of the laws of an indefinite number of other states or sovereignties; while the citizens of the state who had not come into it from other countries would

icy of the common law is to brand *all* as illegitimate who are born before lawful matrimony.

¹ Smith v. Kelly, 23 Miss. 167; Story, Conf. Laws, § 87.

² Shaw v. Gould, L. R. 3 H. L. 55. In this case a wife who had been divorced in Scotland, but by reason of the fact that the decree of divorce in the Scotch courts was not recognized in England as dissolving the marriage, after procuring her Scotch divorce was married in that country to an Englishman, who thereafter lived in that country with her and had children by the marriage. But

by the law of England the divorce was invalid: the first marriage was in effect, and the second unlawful, and the issue of the second marriage were likewise held to be illegitimate. Lord Westbury said in this case: "A foreign court may settle the conditions on which it will exercise its jurisdiction; those conditions being fulfilled, it may exercise that jurisdiction; but the judgment given under such circumstances cannot claim extraterritorial authority unless pronounced in accordance with the rules of international public law."

all have to live under the laws of their own state, and would consequently be deprived of many privileges, rights and immunities which other citizens of the same state might enjoy by reason of a status obtained by virtue of the laws of some other country.

§ 613. Rule of construction of statutes.—The courts, as a general rule, will always lean to a construction of a law which will uphold legitimacy and save the children of a doubtful marriage from the disgrace and ignominy of bastardy and its attendant disabilities. Upon this principle, in passing upon a statute of Kentucky which provided that where the marriage was contracted in good faith, and with the belief of the parties that a former husband or wife, then living, was dead, the issue of such marriage born or begotten *before* notice of the mistake shall be the legitimate issue of both parents, and it was not expressly stated that issue born after such notice should be illegitimate, it was held by the court of appeals of that state under this statute that issue born both before and after such notice would be legitimate.¹ This is because the law favors legitimacy, and will always seize upon any reasonable pretext to pronounce a child legitimate rather than otherwise.

§ 614. Domicile.—Generally the domicile of a bastard follows the domicile of his mother; for at common law a bastard is *nullius filius* and has few legal rights. If it did not follow that of his mother, it would be in the place of his birth; for a bastard, as all others, must have a domicile. And as an infant bastard could not change his domicile of his own free will, it would have to remain where he was born unless he took that of his mother. But a bastard whose parents afterwards marry, whereby he is made legitimate, will take the domicile of his real father, and this will relate back to the time of his birth.² The domicile of the bastard as thus established is recognized in all jurisdictions.³ This is necessarily the general rule, because

¹ *Harris v. Harris*, 85 Ky. 49, 2 S. W. Rep. 549; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. Rep. 737.

² *Undy v. Undy*, 1 L. R. H. L. Sc. 441. See also *Wharton, Conf. Laws*, § 89.

³ *Woodward v. Woodward*, 3 Pickle (Tenn.), 644, 11 S. W. Rep. 892; *Story, Conf. Laws*, § 37; *Jacobs, Domicile*, § 105; *Wharton, Conf. Laws*, § 37.

in all cases the inquiry must be directed towards ascertaining what is the true domicile. This done, it is the true domicile with all courts and in all countries. The character and status thus fixed upon a person attends him everywhere. But in case of bastards proper, the domicile which the bastard has by birth cannot be changed by him while he is an infant. Nor can it be changed by his mother in moving to a different place from that of birth, and taking the child with her, though this be with his full consent.¹

¹ *Sidney v. Winthrop*, 5 Greenl. (Me.) 123.

CHAPTER IX.

INFANTS.

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§ 615. **Definition of infant.**—The popular meaning of the term “infant” is a young child. The legal meaning is different and more broad. In law any person under twenty years of age is an infant. This is the rule of the common law.¹ In many, and perhaps most, of the American states the rule of the common law has been changed as to the age of maturity in females, and they are generally recognized as *sui juris* at the age of eighteen. An infant attains his majority in law the first instant of the last day of the twenty-first year next before the anniversary of his birth; because, according to the civil computation of time, which differs from the natural computa-

¹ 1 Bl. Comm. 463; Bouvier, Law Dict., “Infant.”

tion, the last day having commenced, it is considered as ended.¹ The law rejects fractions of a day in order to avoid any uncertainty as to time.² Persons laboring under the disabilities of infancy are given many privileges and are protected from injury and imposition by many safeguards and rights which are denied to grown persons. The rights, privileges, duties and liabilities of infants generally will receive discussion in this chapter.

§ 616. Contracts of, voidable.—All contracts made by an infant which are not for necessities are void or valid at his option. He may, if he elects to do so, ratify his agreements made during infancy upon arriving at the age fixed by law at which an infant becomes *sui juris*. But, until he arrives at such age, his contracts are voidable at his pleasure, and may be either avoided or ratified when he attains his majority.³ A marriage contract is also within this rule. Therefore, if an infant marries before reaching the age prescribed by law at which he may make a binding contract of marriage, such contract will be voidable, and he may sue to disaffirm it on the ground of infancy,

¹ Bouvier, Law Dict., "Infant."

² 2 Bl. Comm. 141.

³ Price v. Jennings, 62 Ind. 111; Melhop v. Rae, 90 Iowa. 30, 57 N. W. Rep. 650; Cummings v. Powell, 8 Tex. 80; Stewart v. Baker, 17 Tex. 418; Bingham v. Barley, 55 Tex. 285; Eubanks v. Peak, 1 Bai. (S. C. Law), 497; Shrock v. Crowl, 83 Ind. 243; Harner v. Dipple, 81 Ohio St. 72; McMinn v. Richmonds, 6 Yerg. (Tenn.) 19; Langford v. Frey, 8 Humph. (Tenn.) 446; Little v. Dugan, 9 Rich. (S. C. Law), 55; M'Coy v. Huffman, 8 Cowen, 84; Judkins v. Walker, 17 Me. 38; Vaughn v. Parr, 20 Ark. 600; Englebert v. Troxell, 40 Neb. 195, 58 N. W. Rep. 852; Hyde v. Courtwright, 14 Ind. App. 106, 42 N. E. Rep. 647; Rice v. Boyer, 108 Ind. 472, 9 N. E. Rep. 420; Board v. Anderson, 63 Ind. 367; McCarthy v. Henderson, 138 Mass. 310; Phillipps v. Green, 3 A. K. Marsh. (Ky.) 7; Boyden v. Boyden, 9 Metc. (Mass.) 519; Lynde v. Budd, 2 Paige Ch. 191; Dilk v. Keighley, 2 Esp. 480;

Bayliss v. Diveley, 3 M. & S. 477; Smith v. Bowen, 1 Mod. 25; Bool v. Mix, 17 Wend. 119; Trueman v. Hurst, 1 T. R. 40; Henderson v. Fox, 5 Ind. 489; Carpenter v. Carpenter, 45 Ind. 142; Dorrell v. Hastings, 28 Ind. 478; Cook v. Bronaugh, 13 Ark. 183; Bozeman v. Browning, 31 Ark. 364; Terry v. McClintock, 41 Mich. 492, 2 N. W. Rep. 787; State v. Binder, 57 N. J. Law, 374, 31 Atl. Rep. 215; House v. Alexander, 105 Ind. 109, 4 N. E. Rep. 891; Williams v. Moor, 11 M. & W. 256; Lemon v. Beeman, 45 Ohio St. 505, 15 N. E. Rep. 476; Wheaton v. East, 5 Yerg. (Tenn.) 41; Harrison v. Burns, 84 Iowa, 446, 51 N. W. Rep. 165; Kendrick v. Neisz, 17 Colo. 506, 30 Pac. Rep. 245; Reed v. Lane, 61 Vt. 481, 17 Atl. Rep. 796; Richey v. Brown, 58 Mich. 435, 25 N. W. Rep. 386; Philpot v. Sandwich Mfg. Co., 18 Neb. 54, 24 N. W. Rep. 428; Smith v. Kelley, 13 Metc. (Mass.) 309; Whitmarsh v. Hall, 3 Denio, 375; Savager v. Lichlyter, 59 Ark. 1, 26 S. W. Rep. 12.

though an infant is usually allowed to contract marriage before arriving at majority.¹ This is entirely proper, for it would be inconsistent to permit an infant to avoid his contracts in general because of his infancy and the immaturity and indiscretion incident thereto, and at the same time hold him bound by a contract of marriage, the most important and serious in its consequences of any he could make, whether he be an infant or a full-grown child. Indeed, the protection of the law is more necessary in contracts of marriage than in any other class of contracts, because of the grave consequences of marriage, and the very serious effect it may have on the permanent welfare and happiness of the infant.

§ 617. Immunity from liability on contracts — Privilege personal to infant.— While the law gives the infant the right to avoid a contract made during minority after becoming of age, this right is personal to the infant and cannot be pleaded or exercised by another. The rule being for the protection of infancy, the necessity and reason therefor can have no application to a third person, and the law never extends the privilege so far. Therefore, if the infant does not plead or take advantage of his disability, a stranger will never be heard to plead the same for his own benefit.² Of course, generally speaking, the rule will embrace those having a privity of relation with the infant, and they may plead the disability of infancy with the same effect that the infant himself could. An administrator or executor of an infant, therefore, may plead the disability when sued in his representative capacity on a contract of the infant made during life and before attaining majority, where the infant dies before attaining majority or before the time allowed him by law after reaching full age within which to renounce his obligations has expired.³ So the

¹ *Elliott v. Elliott*, 77 Wis. 634, 46 N. W. Rep. 806; *Bool v. Mix*, 17 Wend. 119. *Hooker*, 13 Barb. 536; *Walton v. Gaines*, 94 Tenn. 420, 20 S. W. Rep. 458.

² *Voorhees v. Wait*, 3 Greene (N. J. Law), 343; *Oliver v. Hordlet*, 13 Mass. 237; *Jackson v. Todd*, 6 Johns. 257; *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. Rep. 506; *Jefford's Adm'r v. Ringgold*, 6 Ala. 544; *Van Bramer v. Cooper*, 2 Johns. 279; *Slocum v.* ³ *Jefford's Adm'r v. Ringgold*, 6 Ala. 544; *Smith v. Mayo*, 9 Mass. 62; *Hussey v. Jewett*, 9 Mass. 100; *Parsons v. Hill*, 8 Mo. 135; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236; *Simpkins v. Searcy*, 10 Tex. Civ. App. 406, 32 S. W. Rep. 849.

heir of an infant may plead the disability of his ancestor in an action on a bond or other obligation of the latter, as he is privy in blood.¹ And it has been held that the surety of an infant may plead his disability in a proceeding to charge the property of the infant with liability for the debt.² Of course, the surety could not plead the disability if the infant should live to be of age and then ratify his act, or, being then sued, did not avail himself of the defense of infancy. For, when the contract is ratified, it becomes effective and cannot then be avoided either by the infant principal or his surety. Both are then alike liable on it. But if the infant upon attaining majority should repudiate the contract, the obligation would thereby become inoperative and neither the infant nor his surety would be liable.³

§ 618. Contracts with adults — Liability of adult.— The contracts of an infant with an adult person, while voidable as to the infant, are nevertheless valid and binding on the party to the contract who is *sui juris*. The purpose of the law being to shield the infant from improvident or improper contracts does not apply to those whom the law supposes to be capable of taking care of their own interests in making contracts, and consequently they will not be heard to plead in bar of their contracts that the other party was under the disability of infancy when they were entered into.⁴ The same rule applies where the other party is a corporation. The infant may repudiate the contract with the corporation, but the latter cannot avoid its agreement with the infant.⁵ The law lends special favor to infants in the matter of their contracts because of their immaturity and comparative helplessness, and is quick

¹ *Parsons v. Hill*, 8 Mo. 135; *Den v. Stowe*, 2 Dev. & Bat. (N. C. Law), 320; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236; *Gillenwater v. Campbell*, 142 Ind. 529, 41 N. E. Rep. 451; *Austin v. Charlestown*, 8 Metc. (Mass.) 196; *Walton v. Gaines*, 94 Tenn. 420, 29 S. W. Rep. 458; *Harvey v. Briggs*, 68 Miss. 60, 8 S. Rep. 275.

² *Ayers v. Burns*, 87 Ind. 245.

³ *Keokuk Co. State Bank v. Hall* (Iowa), 72 N. W. Rep. 832.

⁴ *Eubanks v. Peak*, 2 Bai. (S. C. Law), 497; *Titman's Adm'r v. Titman*, 64 Pa. St. 480; *Smith v. Bowin*, 1 Mod. 65; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236; *Morris v. Kasling*, 79 Tex. 141, 15 S. W. Rep. 226; *Holiness v. Rice*, 45 Mich. 142, 7 N. W. Rep. 300.

⁵ *Monagham v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. Rep. 797.

to relieve them from the obligation of ordinary undertakings. So, if an infant engages his services to another for a time, and in pursuance of his contract enters upon his duties, but quits his master without consent before the expiration of the time he is to work according to the agreement, he may recover from the master the value of the services rendered up to the time of quitting.¹ In New York it has been held that the master, in such a case, has no right to deduct from the value of the services of the infant anything for an injury arising to the master because of the breach of contract by the infant.² The contrary rule, however, seems to have been recognized in Maine.³ But the rule as announced in New York seems the most appropriate and proper. For, while an infant is liable for his torts, pure and simple, as a general rule, yet he is certainly not liable for an injury growing out of a contract, or arising upon a breach thereof. But the injury, upon principle, must be separable and entirely distinct from the contract before an infant can be held for it. As he is not liable on his ordinary contracts, it certainly follows that he cannot be held for an injury growing out of or arising from the contract. For, in such a case, the person injured, in order to show a cause of action, must rely upon the contract. Relying upon the contract, he encounters a condition of things which protects the infant and precludes the right of recovery. The tort thus arising, therefore, cannot be made the basis of either an original action or counter-claim or set-off in an action against the infant for the value of his services, aside from contractual considerations.

§ 619. Right to recover for services.— While an infant may not recover for domestic services from those who stand *in loco parentis* to him, yet he may in all cases recover therefor, either from the parent or a third person, when the circumstances and facts preclude the idea of mutuality of duty. An infant who works for a stranger requesting his services is not presumed to work for his food and raiment, though these be furnished by the third person; but he will be entitled to recover the reasonable

¹ *Moses v. Stephens*, 2 Pick. (Mass.) 375; *Thomson v. Marshal*, 50 Mo. App. 332; *Medbury v. Watrous*, 7 Hill 145.

(N. Y.), 110, overruling *McCoy v. Huffman*, 8 Cowen, 84; *Judkins v. Walker*, 17 Me. 38; *Whitmarsh v. Hall*, 3 Denio,

² *Whitmarsh v. Hall*, 3 Denio, 375.

³ *Judkins v. Walker*, 17 Me. 38.

value of his services where no express contract for the amount of pay is made, less, of course, the value of his board and clothing as well as other like necessary domestic expenses.¹ He may likewise recover for similar services where rendered at request of the father, if after emancipation of the child.² But where the infant has no home and no parent or guardian, he may contract with a stranger to be received into his family, and have support in return for any domestic services he may render; and the entering into such an agreement by an infant will preclude him from afterwards asserting a right to recover for the value of the services thus rendered in the family relation.³ But, of course, an infant may make an express contract for services rendered another, when to do so does not conflict with his duties to his parents or guardian; and though he may quit the service of the stranger without giving a stipulated notice, yet the master will be liable to the infant for the value of the services rendered to and accepted by him, as he is chargeable with notice of the law which shields the infant from the duty of performance of a contract.⁴

§ 620. Liability on bastardy bond.—It is usually provided by statute in this country that the father of a bastard may be required to enter into an obligation to the state conditioned for the payment of a certain sum per month, or otherwise assuring the support by the father of a bastard child. As this duty and liability is fixed by law on all persons who may become the parent of a bastard child, an infant cannot invoke his disability in avoidance of a liability he has thus incurred for which he has entered into an obligation to pay. For, aside from the obligation, as well as under it, he is generally required by statute to afford support for his bastard child, and the law requiring this has the effect of modifying the general law of the liability of an infant upon his contracts to this extent.⁵ As

¹ Lockwood v. Robbins, 125 Ind. 398, 25 N. E. Rep. 455; Gerard v. Dill, 96 Ind. 476.

² Phelps, Dodge & Palmer Co. v. Hopkinson, 61 Ill. App. 400.

³ Purriance v. Schultz, 16 Ind. App. 94, 44 N. E. Rep. 766.

⁴ Whitmarsh v. Hall, 3 Denio, 375;

Goffney v. Hayden, 110 Mass. 137; Dearden v. Adams (R. I.), 36 Atl. Rep. 3; Dubé v. Beaudry, 150 Mass. 448, 23 N. E. Rep. 222.

⁵ Inhabitants of Bordentown Tp. v. Wallace, 50 N. J. L. 13, 11 Atl. Rep. 267; McCall v. Parker, 13 Metc. (Mass.) 372; People v. Morris, 4 Denio, 518.

the infant is liable on such an undertaking it follows that his surety is also.¹

§ 621. Liability on a warranty.—It has been held that an action will lie against an infant for a false warranty of a horse for soundness which is sold by him.² But this certainly cannot be the correct rule. The liability upon the warranty arises by operation of contract. It is a part and parcel of the contract itself, and derives its existence and any legal force which it may have from the contract. Without a contract of warranty there could be no cause of action against the infant in such a case. The better rule, therefore, seems to be that, in the absence of fraud, an infant is not liable upon a contract of warranty.³ Even if there be fraud and false representations in the contract of the infant there can be no relief under the contract nor remedy for an injury flowing therefrom, however fraudulent the contract itself may be.⁴ This principle is well illustrated in cases of false warranty in a sale or exchange of property, as where an infant sells or trades a horse to another, representing and even warranting in the transaction that the horse is sound and free from defects. Such warranty does not render the infant liable thereon, nor entitle the other party to the contract to rescind the same. “If,” says Lord Kenyon, “it were in the power of a plaintiff to convert that which arises from a contract into a tort, there would an end to that protection which the law affords infants.”⁵

§ 622. Liability on warranty — Suretyship.—There is no way in which an infant may become liable on his warranty. This is nothing more than a contract, and he can no more be liable on this species of contract than on any other.⁶ For the same

¹ *McCall v. Parker*, 13 Metc. (Mass.) 372; *Inhabitants of Bordentown Tp. v. Wallace*, 50 N. J. L. 13, 11 Atl. Rep. 267.

² *Word v. Vance*, 1 N. & McC. (S. C.) 197.

³ *Johnson v. Pye*, 1 Sid. 258; *Brown v. Dunham*, 1 Root (Conn.), 272; *Liverpool A. L. Ass'n v. Fairhurst*, 9 Exch. 422; *Curtin v. Patten*, 11 S. & R. (Pa.) 805; *Groves v. Neville*, 1 Keb. 778;

Lewis v. Littlefield, 15 Me. 233; *Root v. Stephens*, 24 Ind. 115; *Gilson v. Spear*, 38 Vt. 311; *Green v. Greenbank*, 2 Marsh. (E. C. L.) 485; *Price v. Hewett*, 18 Pa. St. 9; *Bird v. Swain*, 79 Me. 529, 11 Atl. Rep. 421.

⁴ *Green v. Greenbank*, 2 Marsh. (E. C. L.) 485.

⁵ *Jennings v. Rundall*, 8 T. R. 335; *Witt v. Welsh*, 6 Watts (Pa.), 911.

⁶ *Prescott v. Norris*, 32 N. H. 101.

reason an infant cannot become a surety on a bond or other undertaking so as to bind himself thereby.¹ But the mere fact that an infant is not liable on a bond or other instrument of suretyship, because of his minority, in no sense affects the liability of those who are *sui juris*.² The rule that an infant is not liable on his warranty exists regardless of whether the warranty was false and fraudulent or otherwise. The warranty being but a part of the contract can no more be enforced than could the contract itself.³ So an infant who sells a horse, and makes a false warranty in the sale of the animal of his qualities or habits, cannot be held liable for a breach of such warranty.⁴

§ 623. Contracts — Partnership.—The fact that an infant may be a member of a firm of partners does not emancipate him nor remove the disabilities of infancy. An infant, therefore, as to himself, is not liable on a partnership or firm contract. This is true whether he make it himself, whereby, no doubt, the other partner or partners would be bound, or whether it be a contract made by another partner, whereby, as a general rule, all the members of the partnership would be bound.⁵ Nor is an infant, by the simple act of affiliating with others for business in a partnership, estopped to assert his infancy to protect him from contracts made while under this disability. Why an infant should be estopped to invoke the protection of the law simply because he has entered into a contract of partnership with another — which contract of partnership is void at his election, and of which fact all persons dealing with him must take notice at their peril, just as they must take notice at their peril that any contract of an infant is voidable — is very difficult to understand. He does not hold himself out as able to contract then any more that he does by the simple act of making a contract on his own responsibility; and there is cer-

¹ *Wills v. Evans* (Ky.), 38 S. W. 29 N. W. Rep. 201; *Gibbs v. Merrill*, 3 Taunt. 307; *Neal v. Berry*, 86 Me. 103, 29 Atl. Rep. 987; *Salter v. Krueger*, 65 Wis. 217, 26 N. W. Rep. 544; *Sparman v. Keim*, 83 N. Y. 245. See *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. Rep. 12.

² *Wills v. Evans* (Ky.), 38 S. W. 29 N. W. Rep. 201; *Gibbs v. Merrill*, 3 Taunt. 307; *Neal v. Berry*, 86 Me. 103, 29 Atl. Rep. 987; *Salter v. Krueger*, 65 Wis. 217, 26 N. W. Rep. 544; *Sparman v. Keim*, 83 N. Y. 245. See *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. Rep. 12.

³ *Morrill v. Aden*, 19 Vt. 505.

⁴ *Morrill v. Aden*, 19 Vt. 505.

⁵ *Mason v. Wright*, 13 Met. (Mass.) 808; *Folds v. Allardt*, 35 Minn. 488,

tainly no good reason to hold him estopped or otherwise precluded from asserting his infancy.¹ But while the contract of partnership will not bind the infant, yet it will be good as to the other parties to it if they are *sui juris*, and they may be compelled to account to the infant for his share of the profits of the business.² And the infant himself may, of course, upon attaining his majority, ratify a contract concerning a partnership just as he might any other contract, which, when done, will render such agreement effective in every sense.³ And any act of the infant amounting to a recognition of a contract of partnership, when he becomes of age, which is inconsistent with an intention to repudiate his obligation, will serve to make the partnership arrangement valid and binding, and he will thereby be and become bound for the debts and obligations of the partnership. For in ratifying the agreement he necessarily ratifies contracts of the partnership and becomes liable therefor.⁴ This is true as to the partnership contracts of which he was ignorant as well as those of which he was aware.⁵ The ignorance of one partner of a firm contract made by another in no sense detracts from his liability as a partner, whether he be an infant or an adult.

§ 624. Contracts of infants — Mortgages.— As a deed of trust or a mortgage is clearly a contract, it follows that such an instrument executed by a minor is voidable at his option, just as is any other contract.⁶ So, where an infant has executed

¹ *Folds v. Allardt*, 35 Minn. 488, 29 N. W. Rep. 201. See *contra*, *Kemp v. Cook*, 18 Md. 130.

² *Washington v. Washington* (Tex. Civ. App.), 31 S. W. Rep. 88.

³ *Salinas v. Bennett*, 38 S. C. 285, 11 S. E. Rep. 968.

⁴ *Miller v. Sims*, 2 Hill (S. C. Law), 479; *Salinas v. Bennett*, 38 S. C. 285, 11 S. E. Rep. 968.

⁵ *Miller v. Sims*, 2 Hill (S. C. Law), 479.

⁶ *State v. Plaisted*, 43 N. H. 413; *Roberts v. Wiggin*, 1 N. H. 73; *Corey v. Burton*, 32 Mich. 30; *Barney v. Rutledge*, 104 Mich. 289, 62 N. W. Rep. 869; *American Mortgage Co. v. Wright*, 101 Ala. 658, 18 S. Rep. 399; *Kone v.*

Kone, 18 App. Div. 544, 43 N. Y. S. 662; *Scott v. Brown*, 106 Ala. 604, 17 S. Rep. 731; *Shrock v. Crowl*, 83 Ind. 243; *Hubbard v. Cummings*, 1 Me. 11; *Bank v. Chamberlain*, 15 Mass. 220; *Palmer v. Miller*, 25 Barb. 399; *Askew v. Williams*, 74 Tex. 294, 11 S. W. Rep. 1101; *McGan v. Marshal*, 7 Humph. (Tenn.) 121; *Robinson v. Coulter*, 90 Tenn. 705, 18 S. W. Rep. 250; *Walton v. Gaines*, 94 Tenn. 420, 29 S. W. Rep. 458; *Charles v. Hasted*, 59 N. J. Eq. 171, 26 Atl. Rep. 564; *Salinas v. Bennett*, 38 S. C. 285, 11 S. E. Rep. 968; *Sparr v. Florida Sou. Ry. Co.*, 25 Fla. 185, 6 S. Rep. 60; *Chapin v. Shafer*, 49 N. Y. 407.

a mortgage, he may, in an action to foreclose by the mortgagee, plead his infancy in bar of the right; and this plea once interposed by the infant will inure to the benefit of a purchaser of the property mortgaged from the infant after he arrives at majority.¹ But when the mortgage is executed by the infant to secure the purchase-money of the land or other property therein mentioned and sold to the infant, a sale of such property by the infant upon arriving at full age will amount to a ratification of the contract of sale, and the infant will thereupon be liable to the vendor for the purchase-money, to secure which he executed the mortgage on the property bought.² And where an infant executes a mortgage on his realty, and after attaining majority conveys it by another deed of trust, subject to the first mortgage, this will effect a ratification of the first.³ And in New York it has been held, with questionable propriety, that where an infant executes a mortgage on land, and, after attaining his majority, executes a deed to the same property, the subsequent deed will not invalidate the mortgage.⁴ But the execution of a mortgage after the infant arrives at majority will not invalidate a previous mortgage on the same property during infancy, as the execution of two separate and distinct mortgages on the same property does not necessarily imply an inconsistency.⁵

§ 625. Contracts of infants — Deeds and other written instruments — Validity.—The fact that a contract is executed by an infant under seal, is acknowledged before an officer

¹ *Shrock v. Crowl*, 83 Ind. 243.

² *Lynde v. Budd*, 2 Paige Ch. 191; *Ucker v. Koch*, 21 Neb. 559, 32 N. W. Rep. 583.

³ *Boston Bank v. Chamberlain*, 15 Mass. 220; *Losey v. Bond*, 94 Ind. 67.

⁴ *Palmer v. Miller*, 25 Barb. 399. The deed in this instance purported to convey an undivided moiety in the land, and it does not appear whether it contained covenants against incumbrances. Doubtless had it been a mere quitclaim deed, it would not have amounted to a repudiation of the mortgage. *Singer Mfg. Co. v. Lamb*, 81 Mo. 221. But it would

seem, upon principle, that if an infant should, upon attaining majority, execute a deed of warranty with the usual covenants of seizin and against adverse claims and incumbrances, this would be inconsistent with an intention to abide by the mortgage executed during infancy and would effect a repudiation of it. *Dixon v. Merrill*, 21 Minn. 196. And see *McGan v. Marshal*, 7 Humph. (Tenn.) 121; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221.

⁵ *McGan v. Marshal*, 7 Humph. (Tenn.) 121.

authorized to take acknowledgments, is witnessed by one or more persons, or that any other formality or solemnity accompanies the execution of the same, does not make the agreement binding on the infant. Deeds, bonds, notes, bills of exchange, and all the known kinds of written instruments and contracts, must yield validity to infancy. He may just as effectively disavow these, as a general rule, as he might any other contract or undertaking of any kind or nature whatever.¹

§ 626. Contracts of infants — How ratified.— As the contract of an infant may be avoided by any act which manifests an intention to repudiate it, so it may be ratified by any act, words or conduct which is inconsistent with the intention to repudiate it. It may be by implication as well and as effectively as by express and positive agreement.² So the acknowledgment by a person after attaining majority that an obligation he has executed during infancy is binding, or that he will pay it either in work, money or other valuable thing, will amount to a ratification.³ But in order that the acts or declarations of an infant upon arriving at majority may have the effect of ratifying a contract made in infancy, they must be made to the person seeking to establish the ratification of the contract and with whom it was made or to whom it has been transferred or assigned. No acts, declarations or promises made by a

¹ *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Young v. Gammel*, 4 Iowa, 207; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. Rep. 852; *Jenkins v. Jenkins*, 12 Iowa, 195; *Jackson v. Carpenter*, 11 Johns. 539; *Tucker v. Moreland*, 3 Pet. 58; *Doe v. Abernathy*, 7 Blackf. (Ind.) 442; *Eagle Fire Co. v. Lent*, 6 Paige Ch. 635; *Cheshire v. Barrett*, 4 McCord (S. C.), 241; *Bagley v. Fletcher*, 44 Ark. 153; *Jennings v. Hare*, 47 S. C. 279, 25 S. E. Rep. 198; *Vallandingham v. Johnson*, 85 Ky. 288, 3 S. W. Rep. 173; *Everson v. Carpenter*, 17 Wend. 419; *Clapp v. Byrnes* (N. Y.), 50 N. E. Rep. 277.

² *Whitney v. Dutch*, 14 Mass. 457; *Orvis v. Kimball*, 3 N. H. 314; *Alldrich v. Grimes*, 10 N. H. 194; *Langdon v. Clayson*, 75 Mich. 204, 42 N.

W. Rep. 805; *American Mortgage Co. v. Wright*, 101 Ala. 658, 14 S. Rep. 398; *Den v. Stowe*, 2 Dev. & Bat. (N. C. Law), 320; *Norris v. Vance*, 3 Rich. (S. C. Law), 168; *Durfee v. Abbott*, 61 Mich. 471, 28 N. W. Rep. 521; *Whittemore v. Cope*, 11 Utah, 344, 40 Pac. Rep. 256; *Austin v. Burrows*, 62 Mich. 181, 28 N. W. Rep. 862; *Wheaton v. East*, 5 Yerg. (Tenn.) 41; *Barrow v. Barrow*, 4 K. & J. 409; *Jackson v. Burchin*, 14 Johns. 124.

³ *Edgerly v. Shaw*, 5 Foster (N. H.), 514; *Whitney v. Dutch*, 14 Mass. 457. And see *Jackson v. Burchin*, 14 Johns. 124; *Eubanks v. Peak*, 2 Bai. (S. C. Law), 497; *Bobo v. Hansel*, 2 Bai. (S. C. Law), 114; *Cheshire v. Barrett*, 4 McCord (S. C. Law), 241.

grown infant to a stranger, who is in no way connected with the contract, can have any force, as there is in such a case no privity or mutuality.¹ It has been held that an executor or administrator of an infant may ratify a contract of his intestate made during infancy, though the infant died before attaining majority.² An infant who has sold his property and, upon coming of age, receives the purchase-money, or who has previously received it, and after majority converts it to his own use, thereby effects a ratification of the contract, as such act is inconsistent with any other intention.³ Upon a like principle the exercise of ownership over anything after attaining majority which he may have received for property sold while under the disability of infancy will preclude him from contending that the contract is not valid or that he has not ratified it.⁴ So an infant who, upon coming of age, takes up a deed executed during infancy and executes another on the same property in lieu thereof, ratifies the former conveyance.⁵ The principle underlying this rule of law is that receiving back the deed does not operate to divest the title.⁶ The second conveyance, therefore, being an express recognition of the first, serves to make it effective, and the voidable title conveyed by the first becomes valid in every sense. And a contract of an infant is ratified, after he attains majority, by any act amounting to a ratification, though when ratified the adult child is ignorant of the legal effect of the act of ratification.⁷ And frequently an act of an infant after coming of age will serve as a ratification, though it be but a slight circumstance indicating this intention.⁸

§ 627. Deed of infant — Ratification — Third parties.—
The deed of an infant may be avoided, and if not avoided

¹ *Hoit v. Underhill*, 9 N. H. 436; *Jackson v. Mayo*, 11 Mass. 147.

² *Jefford's Adm'r v. Ringgold*, 6 Ala. 544.

³ *Ihley v. Padgett*, 27 S. C. 300, 3 S. E. Rep. 468; *Smith v. Gray*, 116 N. C. 311, 21 S. E. Rep. 200; *Bogart v. Bogart*, 138 Mo. 419, 40 S. W. Rep. 91.

⁴ *Whittemore v. Cope*, 11 Utah, 344, 40 Pac. Rep. 256; *Darraugh's Adm'r v. Blackford*, 84 Va. 509, 5 S. E. Rep. 542.

⁵ *Cox v. McGowan*, 116 N. C. 131, 21 S. E. Rep. 108.

⁶ *Strawn v. Morris*, 21 Ark. 80; *Neal v. Speigle*, 38 Ark. 68; *Driver v. Friedheim*, 43 Ark. 203; *Taliaferro v. McGhee*, 34 Ark. 503.

⁷ *Bestor v. Hickey* (Conn.), 41 Atl. Rep. 555.

⁸ *Cheshire v. Barrett*, 4 McCord (S. C. Law), 241.

within the time the law requires it becomes effective. It is held in Illinois, however, that when an infant makes a conveyance of land, and on arriving at majority ratifies the transaction, though not by deed, a sale of the same land to a third party by the infant after arriving at age will carry a good title when such third party had no notice of the affirmance of the contract.¹ This, however, certainly is not correct, and while the decision seems to rest in part, if not principally, upon the registration laws of Illinois, if sound law in that state, it cannot be sound generally. For when the deed or writing of an infant is ratified by any of the acts recognized by law as having this effect, the validity of same necessarily relates back to the time of the transaction. Certainly it is effective after the ratification; for, were this not true, the ratification would be a nullity, and the principle of law that a deed or other writing obligatory executed by an infant may be ratified by parol after attaining majority would fail.²

§ 628. Contracts of infants—Ratification—Effect of silence with reference to ratification.—Where an infant has made a contract before arriving at full age, it is generally necessary that he do some act amounting to a recognition of the binding force of the agreement before it can be enforced against him. It is not sufficient ordinarily that he merely remain silent as to whether he will recognize it or not, for this is neither a recognition nor a repudiation of the contract, and unless it be recognized in some affirmative way by the infant there can be no liability.³ But to this general rule there are recognized exceptions. As, where an infant comes into possession of property by virtue of his contract, and after attaining majority he still keeps it for a time beyond which he might reasonably disaffirm his agreement, the law will then hold him to an election

¹ Black v. Farwell, 36 Ill. 376.

² Vaughn v. Parr, 20 Ark. 600; Wheaton v. East, 5 Yerg. (Tenn.) 41; Hastings v. Dollarhide, 24 Cal. 195.

³ Benjamin v. Wherry, 1 Bai. (S. C. Eq.) 28; Vaughn v. Parr, 20 Ark. 600; Englebert v. Troxell, 40 Neb. 195, 58 N. W. Rep. 852; Stull v. Harris, 51 Ark. 294, 11 S. W. Rep. 604; Sims v.

Everhardt, 102 U. S. 300; Boody v.

McKinney, 23 Me. 517; Tyler v. Estate of Gallop, 68 Mich. 185, 35 N. W. Rep. 902; Bagley v. Fletcher, 44 Ark. 153; Gilkinson v. Miller, 74 Fed. Rep. 131; Behn v. Molly, 133 Pa. St. 614, 19 Atl. Rep. 421, 562; Dolph v. Hand, 156 Pa. St. 91, 27 Atl. Rep. 114; Hill v. Nelms, 86 Ala. 442, 5 S. Rep. 796.

to be bound by the contract, as such acts after becoming *sui juris* indicate a ratification. In such cases he should put the party having dealt with him on notice within a reasonable time after arriving at age of his intention to disaffirm.¹

§ 629. Contracts of infants — Disaffirmance — Laches.— While an infant during the period of minority is not guilty of laches,² yet when he arrives at maturity he may be. The reason for the protection which the law assured him in his infancy vanishes when he arrives at full age. He can then sue as others may, and it becomes his duty to do so within a reasonable time, just as this is imposed on others. The period of reasonable time, of course, would not begin to run until he reached majority, but just as soon as this age is attained it will; and if he neglect for an unreasonable time to assert his rights, he will be barred.³ But “where time has commenced to run against the ancestor, it still continues to run against the minor heir after the death of the ancestor.”⁴ So, though an infant may ordinarily repudiate his deed after coming of age at any time before the bar of the statute of limitations, yet if he unnecessarily neglects to assert his rights or put the vendee on notice where he has knowledge that valuable improvements are about to be made, which would not be done but upon the assumption that the infant would abide by his contract, he cannot repudiate the transaction after standing by and observing in silence the improvements made by his intended victim, for to do so would be inequitable and unfair, and full-grown infants are held to the observance of equity and good conscience the same as others. They then have no disabilities.⁵

§ 630. Right of infants to repudiate sale of property by guardian or other representative.— Aside from the power

¹ Boyden v. Boyden, 9 Metc. (Mass.) 519.

² Gibson v. Herriott, 55 Ark. 85, 17 S. W. Rep. 589. See Hudson v. White, 17 R. I. 519, 23 Atl. Rep. 57.

³ Sanders v. Bennett (Ky.), 1 S. W. Rep. 436; Aldrich v. Funk, 48 Hun, 367, 1 N. Y. S. 541; Amey v. Cockey, 78 Md. 297. In this case the disabilities of infancy and coverture existed, and it was held that a delay of

five years after the removal of both disabilities was so unreasonable as to bar the right of the former infant.

⁴ Gibson v. Herriott, 55 Ark. 85, 17 S. W. Rep. 589; Wilson v. Harper, 25 W. Va. 179; Henry v. Conn, 12 Ohio, 193; Caperton v. Gregory, 11 Gratt. (Va.) 505; Floyd's Heirs v. Johnson, 2 Litt. (Ky.) 109.

⁵ Davis v. Dudley, 70 Me. 236; Cresinger v. Lessee of Welch, 15 Ohio, 156.

to repudiate contracts executed during infancy, an infant may also repudiate any act done for him by or at the instance of another with like effect that he might disaffirm his obligations entered into while under disability. So, where the land of an infant is sold by his guardian under a void order of court, the infant may, upon arriving at age, institute proper proceedings to set the sale aside; and this is true though the court, having jurisdiction, subsequently adopted the sale and confirmed it. The representative of the infant having no right to make sale of the property of the infant, except in the manner provided by law, the judgment of the court cannot supplant the requirements of law, nor make that valid which, for want of compliance with the law, is not valid.¹ But an infant will not be heard to complain of a sale of his land by a guardian acting under the orders of a court of competent jurisdiction, so far as the *bona fide* purchaser is concerned, where, though the proceedings were irregular and commenced before he attained majority, yet the sale was not made or confirmed until after he came of age, he being cognizant of all the facts and making no objection.²

§ 631. Conveyance by infants — Affirmance — Tacit recognition.— The conveyance of an infant may be effectively affirmed by any tacit or implied recognition of the act, regardless of the statute of limitations or the rule of estoppel and laches. It may “be inferred from an affirmative act of the infant after reaching majority which is inconsistent with an intent to disaffirm.” Any act the effect of which will amount to a tacit recognition of the conveyance will, ordinarily, suffice. For instance, extending the time in which to make payment, receiving payment, in whole or in part, taking a mortgage on the land to secure payment, etc., will amount to a ratification of a conveyance.³ Where an infant eighteen years of age executed a deed to certain land, received the purchase-money, lived near by for fifteen years after majority, knew of valuable improvements being made, to which he made no objection, having the

¹ *Meddis v. Fenley*, 98 Ky. 432, 33 S. W. Rep. 197.

² *Lancaster v. Barton*, 92 Va. 615, 24 S. W. Rep. 251.

³ *Gillespie v. Bailey*, 12 W. Va. 70; *Ferguson v. Bell*, 17 Mo. 347; *Thomas v. Pullis*, 56 Mo. 219; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. Rep. 206.

purchase-money unspent but not offering to return it, such conduct was held tantamount to an express ratification.¹ And under similar circumstances a ratification has been presumed in eight years.²

§ 632. Purchase of realty by infants — Ratification — Silence — Effect.—An infant who buys land from another and is put in possession thereof by his vendor upon a consummation of the sale cannot remain in possession after attaining majority an unreasonable length of time without such conduct having the force and effect of a ratification. Being of age, he then knows, or is supposed in law to know, his rights, and retaining possession of the land bought during infancy, after attaining majority, naturally indicates an election to be bound by the agreement, and the law so regards it.³ But the question of possession is an important feature. If the infant merely buys the land or agrees to pay for it, but does not take and is not given possession by the vendor, the inaction of the infant after arriving at age would be no indication of an intention to ratify the contract, and could not, in the absence of other facts or circumstances indicating an intention to ratify, be construed to have this effect.⁴ In the latter case the person dealing with the infant has nothing to mislead him. There is no overt or other act indicating an acknowledgment after full age of the contract, and there is no reason why the vendor should, in such cases, construe the mere silence of the infant into an election to become bound by his agreement.

§ 633. Contracts of infants with reference to real estate — Silence — Limitations.—Generally, when an infant sells to another real property, his silence as to whether or not he will repudiate the agreement will not amount to a ratification or preclude him from recovering same from his vendee at any time within which he would not be barred by the statute of limitations after coming of age, unless there is some feature of an estoppel or laches which would preclude him from asserting his

¹ *Dolph v. Hand*, 156 Pa. St. 91, 27 Atl. Rep. 114.

² *Heiatt v. Dixon* (Tex. Civ. App.), 23 S. W. Rep. 263.

³ *Hubbard v. Cummings*, 1 Greenl. (Me.) 10; *Armfield v. Tate*, 7 Ired.

(N. C. Law), 258.

⁴ *Boody v. McKenney*, 23 Me. 517.

right. Mere silence, alone, will not bar his right to rescind, unless for a period long enough to ripen a title in the adverse possessor by prescription.¹ The principle upon which this rule is based is, the infant must act affirmatively in some way to effect a ratification.

§ 634. Contracts of infants concerning real property — Ratification — Silence — Estoppel.— While the general rule is that the mere silence of an infant after arriving at the age of majority will not deprive him of the right to disaffirm a sale of his real property within the period of limitations prescribed by law, yet there are exceptions to this rule well grounded and fully recognized. These exceptions are where the infant is guilty of acts or conduct which would amount to an estoppel or bar him under the rule of laches. When of age, any one may estop himself by his acts and conduct or declarations, for the infant is no longer entitled to the protection of the law any more than others. His disabilities of infancy are gone, and there is no longer any reason why he should be excused in law for the consequences of his acts and conduct. When, therefore, an infant during minority has conveyed land to another, and after arriving at full age leads his vendee, either by express promise or assurance of any kind or by conduct or acts, to do that which he would not do to his prejudice but for the acts, conduct or declarations of the full-grown infant, he will then be estopped to take advantage of his infancy to the injury of his misled victim.² This wholesome rule takes its existence

¹ Richards v. Pate, 93 Ind. 423; Eureka Co. v. Edwards, 71 Ala. 248; Boody v. McKenney, 23 Me. 517; Deason v. Boyd, 1 Dana (Ky.), 45; Hoffert v. Miller, 86 Ky. 572, 6 S. W. Rep. 447; Wells v. Siexas, 24 Fed. Rep. 82; Sims v. Everhardt, 102 U. S. 300; Lessee of Drake v. Ramsey, 5 Ohio, 152; Prout v. Wiley, 28 Mich. 164; Irvine v. Irvine, 9 Wall. 627; Voorhies v. Voorhies, 24 Barb. 153; Tucker v. Moreland, 10 Pet. 76; Vaughn v. Parr, 20 Ark. 600; Bozeman v. Browning, 31 Ark. 364; Davis v. Dudley, 70 Me. 236; Gause v. Norcum, 12 Mo. 550; Norcum v. Gaty, 19 Mo. 69; Huth v. Car. Mar.

Ry. & D. Co., 56 Me. 203; McMurray v. McMurray, 66 N. Y. 175; Cresinger v. Lessee of Welsh, 15 Ohio, 156; Duffee v. Abbott, 61 Mich. 471, 28 N. W. 521; Lacey v. Pixley, 120 Mo. 383, 25 S. W. Rep. 206; Donovan v. Ward, 100 Mich. 601, 59 N. W. Rep. 254; Hill v. Nelms, 86 Ala. 442, 5 S. Rep. 796; Wilson v. Branch, 77 Va. 65; Gillespie v. Bailey, 12 W. Va. 70; Thomas v. Pullis, 56 Mo. 219. And see Call v. Phelps (Ky.), 45 S. W. Rep. 1051.

² Morris v. Stewart, 14 Ind. 334; Wheaton v. East, 5 Yerg. (Tenn.) 41; Bostwick v. Atkins, 3 N. Y. 53, 60; Hartman v. Kendall, 4 Ind. 403;

from the salient principle of natural justice which forbids one to profit by an unconscionable or unfair advantage or fraud or bad faith of any kind practiced upon another, and commends itself to the hearty approval of the lover of simple justice and natural equity. Both the purpose and effect of it are wholesome, and the principle itself is firmly fixed and well founded.

§ 635. Ratification of contracts upon arriving at majority — Effect of.—As the contracts of an infant are not absolutely void, but voidable only, it necessarily follows that he may, upon attaining his majority, recognize and ratify his agreements made during infancy; for then he has attained that discretion and mental development deemed necessary in law to enable him to contract in general; and, as he can now make a contract, his judgment is supposed to shield him from ratifying any that may have been improper by reason of the indiscretion and immaturity incident to infancy.¹ And when an infant, after attaining his majority, ratifies a contract made by him during his minority, he becomes, by such act of ratification, irrevocably bound by the agreement.² And the ratification when made relates back to the time of the contract and gives it effect accordingly.³

§ 636. Ratification of contracts — Instances where held good.—Where an infant has leased premises, and upon coming of age continues in possession under the lease and in pursuance thereof, such acts amount to a ratification of the contract.⁴ Likewise an infant who buys property, and after attaining his majority still keeps and claims it by virtue of his purchase, thereby effects a ratification of the contract of sale and is bound by it the same as though it had been made after he had

Lessee of Wallace v. Lewis, 4 Harr. (Del.) 75; Thomas v. Pullis, 56 Mo. 211.

¹Southerton v. Whitlock, 2 Str. 690; Munk v. Weidner, 9 Tex. Civ. App. 491, 29 S. W. Rep. 409; Kendrick v. Neisz, 17 Colo. 506, 30 Pac. Rep. 245.

²Cheshire v. Barrett, 4 McCord (S. C. Law), 241; Eubanks v. Peak, 2 Bai. (S. C. Law), 497; Whitney v. Dutch, 14 Mass. 457; Patterson v. Lippincott,

47 N. J. Law, 457, 1 Atl. Rep. 506; Edgerly v. Shaw, 5 Foster (N. H.), 514; Vaughn v. Parr, 20 Ark. 600; Cohen v. Armstrong, 1 M. & S. 724; Curry v. St. John Plow Co., 55 Ill. App. 82; Hoyt v. Sprague, 103 U. S. 613; Myers v. Kingston Coal Co., 126 Pa. St. 582, 17 Atl. Rep. 891; Hastings v. Dollarhide, 24 Cal. 195.

³Palmer v. Miller, 25 Barb. 399.

⁴Baxter v. Bush, 29 Vt. 465.

become *sui juris* in the first instance.¹ One who has borrowed money during infancy, and on arriving at age agrees to pay it back at some future time, thereby renders himself liable for it.² But to make the promisor liable upon express contract, the agreement to pay after attaining majority must be made to the party in interest.³ If an infant purchases land and at the same time executes a deed of trust on same to secure the purchase-money, a ratification of the purchase of the land upon attaining majority will have the effect of ratifying the mortgage, for this, in such a case, becomes part and parcel of the contract of sale. In other words, the sale and mortgage will be construed to be one transaction.⁴ Where an infant took a note in payment for work he had done for another and kept it eight months, at the end of which time he offered to return it to the maker, who refused to receive it back, it was held that he did not repudiate his contract in apt time, and that he could recover for his services only what was stipulated in the note.⁵ And where an infant conveys land, and upon arriving at majority joins with his grantee in a deed of trust on the same land to secure an indebtedness due from his grantee to such stranger, this will amount to a ratification of the conveyance.⁶ An infant who accepts the proceeds of an irregular sale of his land or other property by his guardian, after he becomes of age, with knowledge of all the facts, thereby ratifies the sale.⁷

§ 637. Contracts of infants — Ratification — New consideration not necessary.—As the ratification of a contract already made is but the recognition of its binding force, and as it could not be subject to ratification unless it was originally supported by a valuable consideration, it necessarily follows that a contract which is only voidable because of some disabil-

¹ *Cheshire v. Barrett*, 4 McCord (S. C. Law), 241; *Boyden v. Boyden*, 9 Metc. (Mass.) 519.

² *Jackson v. Mayo*, 11 Mass. 147; *Hatch v. Hatch*, 60 Vt. 160, 13 Atl. Rep. 791.

³ *Jackson v. Mayo*, 11 Mass. 147.

⁴ *Robbins v. Eaton*, 10 N. H. 561; *Dana v. Combs*, 6 Greenl. (Me.) 89; *Young v. McKee*, 13 Mich. 552; Ken-

nedy v. Baker, 159 Pa. St. 146, 28 Atl. Rep. 252; *Heath v. West*, 28 N. H. 108; *Peers v. McLaughlin*, 88 Cal. 294, 26 Pac. Rep. 119.

⁵ *Delano v. Blake*, 11 Wend. 85.

⁶ *Watkins v. Wassell*, 15 Ark. 73.

⁷ *Treadaway v. Veasey*, 97 Ga. 329, 22 S. E. Rep. 915; *Treadaway v. Richards*, 92 Ga. 264, 18 S. E. Rep. 25.

ity of one or both of the parties must necessarily be valid but for such disability. And, being thus valid with this exception, there is no need of a consideration to support it, for this has always existed. There need be no new consideration then in order to give force and effect to a contract upon ratification.¹

§ 638. How written contracts of infants may be ratified. The written contract of an infant may generally be ratified, just as might any other kind of a contract. It may be by words, acts or conduct. It may be in writing, it is true, but this is not necessary to the validity or efficacy of a ratification of a written contract. It is not necessary that the ratification be effected by an instrument of equal dignity with that ratified. Ratification is merely the consent of the infant to regard his voidable written or other contract as binding. It is not the making of a new contract, but merely recognizing one already made to be valid.² Where an infant who has conveyed land, upon arriving at full age executes another conveyance to the same land subject to the first, or in which the first is referred to and recognized as in existence, this will amount to an election to treat the first conveyance as valid.³

§ 639. Contracts of infants — Ratification — Pleading.— Where an action is brought against an infant on an obligation executed during infancy, and the disability is pleaded by the infant, if the opposite party wishes to rely on a ratification he must plead and prove it. It will not be presumed in any case.⁴ The same rule applies when it is sought to evade the disability of infancy on the ground of estoppel. The estoppel, like the ratification, must be pleaded and fortified by proof of the facts

¹ Jeffries, Adm'r, v. Ringgold, 6 Ala. 544; American Freehold Land Mortgage Co. v. Dykes, 111 Ala. 178, 18 S. Rep. 292; Shropshire v. Burns, 46 Ala. 108; Thomasson v. Boyd, 13 Ala. 419; Kendrick v. Niesz, 17 Colo. 506, 30 Pac. Rep. 245; Heady v. Boden, 4 Ind. App. 475, 30 N. E. Rep. 1119.

² Vaughn v. Parr, 20 Ark. 600; Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. Rep. 541; Wheaton v. East, 5 Yerg. (Tenn.) 41; Hastings v. Dollarhide, 24

Cal. 195; Turner v. Gaither, 83 N. C. 362.

³ Bank v. Chamberlin, 15 Mass. 220; Palmer v. Miller, 25 Barb. 399; Lynde v. Budd, 2 Paige, 191; Irvine v. Irvine, 9 Wall. 617; Ward v. Anderson, 111 N. C. 115, 15 S. E. Rep. 933; Losey v. Bond, 94 Ind. 67.

⁴ American Freehold Land Mortgage Co. v. Dykes, 111 Ala. 178, 18 S. Rep. 292.

necessary to constitute the estoppel.¹ From this it necessarily follows that the burden of proof is on the party relying on the ratification or estoppel, as the case may be.

§ 640. Contracts of apprenticeship — Validity.— The contract of an infant for an apprenticeship and incident instruction in some useful art, trade or vocation is usually held to be binding upon him. Such contract is in the nature of an agreement with the master that he furnish the infant with one of the necessities of life, to wit: instruction and proficiency in some useful employment whereby the child may be enabled to earn his own living in after years and attain the greatest possible usefulness to himself and to the public in general. So, where an infant contracts with another to learn a useful trade or vocation, and when the terms, requirements and conditions are fair to the infant, and no undue advantage is taken of the tender years of the child by the master, the contract will be held to be binding upon the infant and effective in every way.² It would seem that when an infant has living parents, the father, or, in the event of his death, the mother, should join in or consent to the apprenticeship.³ If the master should die during the period of apprenticeship the infant would have to serve the executor to the end of the time, provided such personal representative continued the business, and could and was willing to give the same instruction and training to the apprentice which the master, had he lived, would have been bound to do.⁴

§ 641. Acceptance of contracts made for benefit of infants — Presumptions.— Where a conveyance is made by a parent to his infant child, or any other contract is made for his benefit, in which there is no consideration of a pecuniary or property nature moving from the child, there is no necessity of an actual affirmative acceptance by the infant of the benefits of the arrangement, as the law presumes his acceptance, or

¹ Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. Rep. 176.

Rep. 706; Walter v. Everard (1891), 2 Q. B. 369.

² Co. Litt. 172a; Stone v. Dennison, 13 Pick. (Mass.) 1; Cooper v. Simmons, 7 Hurl. & Nor. 707; Pardey v. American Ship Windlass Co. (R. I.), 37 Atl.

³ Cooper v. Simmons, 7 Hurl. & Nor. 707.

⁴ Cooper v. Simmons, 7 Hurl. & Nor. 707.

rather accepts it for him.¹ When the infant for whose benefit a contract has been made by another sues, upon arriving at age, to enforce the agreement, this, in any event, will amount to an effective acceptance of the contract.²

§ 642. Contracts of infants — Duty to return property upon repudiation of contract.— If an infant comes into possession of property of any kind by virtue of a contract of purchase or other contract, agreement or stipulation, and, upon arriving at majority, concludes to rescind his agreement or repudiate his acts done in infancy, he must restore or offer to restore to the other party the property he has thus procured if he has it in his possession or control. If he has it in part only, he must restore the part he still has.³ If, when the infant arrives at full age and elects to rescind his contract by which he has come into possession and control of property he has spent, squandered or otherwise disposed of, by reason of which he is not able to restore it in whole or in part, he will then be entitled, under the law, to rescind without restoring or offering to restore the property thus received either in whole or in part.⁴

¹ *Copeland v. Summers*, 138 Ind. 219, 35 N. E. Rep. 514; *Richards v. Reeves* (Ind. App.), 45 N. E. Rep. 624; *Pruitt v. Pruitt*, 91 Ind. 595, 599. And see also *Bjmerland v. Eley* (Wash.), 45 Pac. Rep. 730; *Redd v. State* (Ark.), 47 S. W. Rep. 119.

² *Copeland v. Summers*, 138 Ind. 219, 35 N. E. Rep. 514.

³ *Corey v. Burton*, 32 Mich. 30; *Badger v. Phinney*, 15 Mass. 359; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. Rep. 206; *Fitts v. Hall*, 9 N. H. 441; *Pemberton B. & L. Ass'n v. Adams*, 53 N. J. Eq. 258, 31 Atl. Rep. 280; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. Rep. 852; *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. Rep. 1039; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. Rep. 906; *Bartlett v. Drake*, 100 Mass. 174; *Jenkins v. Jenkins*, 12 Iowa. 195; *Chandler v. Simmons*, 97 Mass. 508; *Reynolds v. McCurry*, 100 Ill. 356;

Burgett v. Barrick, 25 Kan. 526; *Price v. Furman*, 27 Vt. 268; *Myrick v. Jacks*, 39 Ark. 293; *Curry v. St. John Plow Co.*, 55 Ill. App. 82; *Drew v. Drew*, 40 N. J. Eq. 458, 1 Atl. Rep. 745; *Bingham v. Barley*, 53 Tex. 281; *Boyden v. Boyden*, 9 Metc. (Mass.) 519; *Lynde v. Budd*, 2 Paige, 191; *Dana v. Combs*, 6 Greenl. (Me.) 89; *Cheshire v. Barrett*, 4 McCord (S. C.), 241; *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54, 24 N. W. Rep. 428; *Young v. McKee*, 13 Mich. 552; *Robbins v. Eaton*, 10 N. H. 562; *MacGrael v. Taylor*, 167 U. S. 688, 17 Sup. Ct. Rep. 961; *Stull v. Harris*, 51 Ark. 294, 11 S. W. Rep. 104.

⁴ *Price v. Furman*, 27 Vt. 268; *St. Louis, I. M. & S. Ry. Co. v. Higgins*, 44 Ark. 293; *Vallandingham v. Johnson*, 85 Ky. 288, 3 S. W. Rep. 173; *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. Rep. 1039; *Englebert v. Troxell*,

“The right to repudiate is based on the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself; and where the avails of the property are improvidently spent, or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contracts and in many cases would destroy the right altogether. The right to rescind is a legal right established for the protection of the infant; and to make it dependent upon performing an impossibility, which impossibility has resulted from the acts which the law presumes him incapable of performing, would tend to impair the right and withdraw the protection.”¹ So if a guardian make an unlawful sale or disposition of the property of an infant, the latter need not offer to restore the price paid in order to enable him to renounce the transaction where he has never received it.² If an infant refuses to surrender property which he has received by contract, after repudiating his agreement upon arriving at age, he will be liable to the owner for conversion. He will not be permitted to hold to the fruits of his contract with one hand

40 Neb. 195, 58 N. W. Rep. 852; Briggs, 68 Miss. 60, 8 S. Rep. 270; Young v. West Va., C. & P. Ry. Co., 42 W. Va. 112, 24 S. E. Rep. 615; Stull v. Harris, 51 Ark. 294, 11 S. W. Rep. 104; Craig v. Van Bebbber, 100 Shaul v. Rinker, 139 Ind. 163, 38 N. Mo. 584, 13 S. W. Rep. 906; Fox v. E. Rep. 593; Petrie v. Williams, 68 Drewry, 62 Ark. 316, 35 S. W. Rep. Hun, 589, 23 N. Y. S. 237; Eureka Co. 533; Bartlett v. Drake, 100 Mass. 174; v. Edwards, 71 Ala. 248; American Miller v. Smith, 26 Wis. 248, 2 N. W. Freehold Land Mortgage Co. v. Dykes, Rep. 182; United States Sav. Fund & 111 Ala. 178, 18 S. Rep. 292; Kane v. Inv. Co. v. Harris, 142 Ind. 226, 41 N. Kane, 13 App. Div. 544, 43 N. Y. S. E. Rep. 451; Miles v. Lingerman, 24 662; Dube v. Beaudry, 150 Mass. 448, Ind. 385; Mordecai v. Pearl, 63 Hun. 23 N. E. Rep. 222; Chandler v. Sim- 553, 18 N. Y. S. 543. This salient mons, 97 Mass. 508; Reynolds v. Mc- principle seems to be denied in Min- Curry, 100 Ill. 256; Lemon v. Beeman, nesota. Johnson v. Northwestern 45 Ohio, 505, 15 N. E. Rep. 476; Daw- Mutual Life Ins. Co., 56 Minn. 365, 59 son v. Helms, 30 Minn. 107, 14 N. W. N. W. Rep. 992. Rep. 462; Morse v. Eby, 154 Mass. 458, ¹St. Louis, I. M. & S. Ry. Co. v. 28 N. E. Rep. 577; MacGrael v. Tay- Higgins, 44 Ark. 293; Kerr v. Bell, lor, 167 U. S. 688, 17 Sup. Ct. Rep. 44 Mo. 120; Baker v. Kennett, 54 Mo. 961; Green v. Green, 69 N. Y. 553; 82; Highley v. Barron, 49 Mo. 103. Robinson v. Weeks, 56 Me. 102; Dill ²Grider v. Driver, 40 Ark. 109 119; v. Bowen, 54 Ind. 204; Walsh v. Meyer v. Rousseau, 47 Ark. 460, 464, Young, 110 Mass. 396; Buchizky v. 2 S. W. Rep. 112; Aronstein v. Irvine, De Haven, 97 Pa. St. 202; Harvey v. 48 La. Ann. 301, 19 S. Rep. 131.

and pluck the benefits of a disaffirmance with the other after he arrives at majority.¹ And where an infant gets possession of property under a contract to repair it, or for other like purpose, he cannot withhold same from the owner where he is offered a fair compensation for his services.² When he purchases property during infancy which is not embraced within the term "necessaries," he may tender it back, when his right to recover back the purchase price paid by him will be complete.³ And where an infant contracts for a policy of life insurance, and during minority makes divers payments of premiums, he may, on coming of age, tender back the policy and recover from the company the premiums thus paid.⁴

§ 643. Judgments against — Validity.— In order that there be a binding judgment against an infant it is necessary that every requirement of the law be followed. Especially is this true as to the mode of service of process upon the infant. The laws authorizing service upon or judgments against infants are strictly construed and are required to be faithfully followed and complied with, as nothing will be presumed in order to lend validity to judgments against minors.⁵ None of these requirements of law can be waived by the infant.⁶ Though an infant have a regular guardian, who is duly summoned but fails to appear, no judgment can be properly rendered against the infant until there is a guardian *ad litem* appointed and an

¹ Fitts v. Hall, 9 N. H. 441.

² Maycock v. Solyman, 4 Bos. & Pul. 139.

³ White v. Branch, 51 Ind. 210; Shurtleff v. Millard, 12 R. L. 272; Indianapolis, etc. Co. v. Wilcox, 59 Ind. 429; Cooper v. Allport, 10 Daly, 352; Lemon v. Beeman, 45 Ohio St. 505, 15 N. E. Rep. 476.

⁴ Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 365, 57 N. W. Rep. 934.

⁵ Trapnall v. State Bank, 18 Ark. 53; Haley v. Taylor, 39 Ark. 104; Wells v. Smith, 44 Miss. 396; Frost v. Frost, 15 Misc. Rep. 167, 37 N. Y. S. 18; Hatch v. Ferguson, 57 Fed. Rep. 966; Smith v. Reid, 134 N. Y. 568, 31 N. E.

Rep. 1082; McDermott v. Thompson, 29 Fla. 229, 10 S. Rep. 584; Perin v. Megiben, 53 Fed. Rep. 86, 6 U. S. App. 348, 3 C. C. A. 443; Carrigan v. Drake, 36 S. C. 354, 15 S. E. Rep. 339; Johnson v. Trotter (Ark.), 15 S. W. Rep. 1025; Roche v. Waters (Md.), 18 Atl. Rep. 866; Wernock v. Lear (Ky.), 11 S. W. Rep. 438; Dohms v. Mann, 76 Iowa, 723, 39 N. W. Rep. 823; Jones v. Mathews (Miss.), 4 S. Rep. 547; Sprague v. Haines, 68 Tex. 215, 4 S. W. Rep. 371; Ingram v. Wilson (Ky.), 44 S. W. Rep. 420; Rhoads v. Rhoads, 43 Ill. 239.

⁶ Winston v. McLendon, 43 Miss. 254.

answer interposed by him on behalf of the infant.¹ So a judgment rendered against an infant with his consent is not binding upon him, though of course it would be otherwise in the case of an adult.² And though an infant be duly represented by guardian *ad litem*, this will not authorize a judgment against him unless he has been properly and regularly summoned.³ Again, a binding judgment cannot be rendered against an infant unless there is evidence to support it.⁴ A judgment thus rendered without evidence against an infant will, for this reason, be reversed on appeal.⁵ But where all the requirements of law are faithfully and strictly carried out, and the court has jurisdiction of the subject-matter, a judgment against an infant will be conclusive.⁶

§ 644. Decrees against infants with consent of court.—Sometimes decrees rendered against an infant with the consent of the court have been upheld where it is manifestly to the interest or in furtherance of the rights of the infant.⁷ This rule obtains, it would seem, only in chancery, and in instances where the property rights of others are intimately blended

¹ Woodall v. Delatour, 43 Ark. 521; Booker v. Kennerly, 96 Ky. 415, 29 S. W. Rep. 323; Brown v. Downing, 137 Pa. St. 569, 20 Atl. Rep. 871.

² State v. Atkins, 53 Ark. 303, 13 S. W. Rep. 1097; Griffith v. Ventress, 91 Ala. 336, 8 S. Rep. 312; Bennett v. Bradford, 132 Ill. 269, 24 N. E. Rep. 530. See, apparently *contra*, Gusdofer v. Gundy, 72 Miss. 312, 16 S. Rep. 432.

³ Moore v. Prince, 5 Tex. Civ. App. 352, 23 S. W. Rep. 1113; Allsmiller v. Freutchenicht, 86 Ky. 198, 5 S. W. Rep. 746; Feitner v. Lewis, 1 N. Y. S. 1; Sprague v. Haines, 68 Tex. 215, 4 S. W. Rep. 371; Perry v. Adams, 98 N. C. 167, 3 S. E. Rep. 729; Griffith v. Ventress, 91 Ala. 336, 8 S. Rep. 312; Gay v. Grant, 101 N. C. 206, 8 S. E. Rep. 99.

⁴ Bennett v. Bradford, 132 Ill. 269, 24 N. E. Rep. 630; Quigley v. Roberts, 44 Ill. 503; Preston v. Hodgen, 50 Ill. 56; Tuttle v. Garnett, 16 Ill. 354; Pinchback v. Graves, 42 Ark. 222;

State v. Atkins, 53 Ark. 303, 13 S. W. Rep. 1097; Mills v. Dennis, 3 Johns. Ch. 367; Wright v. Miller, 1 Sandf. Ch. 103.

⁵ Preston v. Hodgen, 50 Ill. 56.

⁶ Smith v. Perkins, 124 Mo. 50, 27 S. W. Rep. 574; English v. Savage, 5 Oreg. 518; Kromer v. Friday, 10 Wash. 621, 39 Pac. Rep. 229; Havens v. Drake, 43 Kan. 484, 23 Pac. Rep. 621.

⁷ Lippiat v. Holley, 1 Beav. 423; Brooke v. Lord Mostyn, 2 De Gex, J. & S. 373; Walsh v. Walsh, 116 Mass. 377; Brooke v. Lord Mostyn, 33 Beav. 457; English v. Savage, 5 Oreg. 518; Savage v. McCorkle, 17 Oreg. 42, 21 Pac. Rep. 445. In Oregon it is held in these cases that a guardian *ad litem*, by virtue of the statutes of that state, may bind an infant in any stage of litigation against him and with reference to all the proceedings, even to confessing judgment. English v. Savage, 5 Oreg. 518.

with those of infants, such as cases in partition, etc. The necessities of the case seem to excuse the rule if anything does; but it certainly should not be carried to the extent of regarding all judgments against infants as valid merely because rendered by the consent of the court; for it is practically impossible that a court render a judgment against a child without consenting to do so. This cannot be regarded as a general rule.

§ 645. Suits by infants in name of next friend or other representative — Binding force of judgment upon infant.— Whenever the law authorizes an action by an infant through a guardian or next friend, and the requirements of law are fully complied with by the representative of the infant suing in this right, the infant is bound effectively by the judgment, and cannot afterwards assail it because he was an infant at the time the action was begun or when the judgment was rendered. Giving him the right to thus sue implies that his suit must be final. For it would be unjust to others to compel them to defend an action by an infant while he was an infant, and again when he arrived at majority.¹ Where statutes authorize actions to be brought by an infant through the medium of a next friend or like representative, the courts always exercise a kind of superintending control over the affairs of the infant with reference to his litigation, to the end that he may not be encouraged in bringing frivolous, improper or unnecessary actions, and, on the other hand, that he be not imposed upon by those representing him.

§ 646. Guardian ad litem — Necessity for.— The statutes of the several states generally provide, in certain cases, for the appointment of a guardian *ad litem* to represent the interests of an infant in pending litigation. This is for the protection of the infant and his property rights. But if the minor have a regular statutory guardian who can act for him, there is no

¹ Kansas City, Ft. S. & M. Ry. Co. v. Morgan, 76 Fed. Rep. 429, 21 C. C. A. 468; Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. Rep. 262; Woodall v. Moore, 55 Ark. 221, 17 S. W. Rep. 268; Corker v. Jones, 110 U. S. 317, 4 Sup. Ct. Rep. 19; Bickel v. Erskine, 43 Iowa, 213; Winchester v. Winchester, 1 Head (Tenn.), 462; Simpson v. Alexander, 6 Cold. (Tenn.) 619; Jeffrie v. Robedaux, 3 Miss. 33; Ralston v. Lahee, 8 Clark (Iowa). 17; Deering v. Hurt (Tex.), 2 S. W. Rep. 42.

necessity for a guardian *ad litem*, and the appointment of one is improper.¹ A guardian *ad litem* for an infant defendant is necessary and proper when, from any cause; the statutory guardian cannot act for his ward, or when he has interests at stake materially conflicting with those of his ward, as, for instance, where the claims of his own children come in conflict with those of the infant.² Because of this salient rule of law it is correctly held that the appointment by the court of an attorney for the adverse litigant to be guardian *ad litem* for the infant is grossly improper and will not bind the infant.³ The answer of a guardian *ad litem* is taken as a denial of the allegations of the complaint and imposes upon the adversary the burden of proving every fact necessary to entitle him to the relief asked.⁴ But if the guardian *ad litem* or regular guardian should fail to do his duty to the infant by interposing in his behalf a proper plea, and a judgment is rendered affecting the rights of the infant because such an answer or other plea is not filed by the representative of the infant as the law requires, the judgment will not be absolutely void, but voidable only.⁵ The fact that the infant defendant fails to ask the court to appoint a guardian *ad litem*, to the end that his interests may properly be represented, or that the court, for any reason, fails or omits to appoint one as the law directs, will not entitle the adverse party to proceed against the infant without such representation. He must see that the guardian *ad litem* is properly appointed, if no one else does, otherwise he will not be permitted to have the relief he seeks.⁶ But if the adversary pleads to the merits of the case without raising the point that the infant is not represented by guardian *ad litem*, he cannot afterwards take advantage of the omission.⁷ And these rights and privileges of the infant are usually gov-

¹ Moore v. Woodall, 40 Ark. 42.

⁴ Carnall v. Wilson, 14 Ark. 482.

² Shiner v. Shiner (Tex. Civ. App.), 40 S. W. Rep. 439; Moore v. Woodall, 40 Ark. 42; Bourland v. Wittich, 38 Ark. 167, 172, 173; Roodhouse v. Roodhouse, 132 Ill. 360, 24 N. E. Rep. 55; Robinson v. Fidelity Trust & Safety Vault Co. (Ky.), 11 S. W. Rep. 806.

⁵ Alexander v. Davis, 42 W. Va. 65, 26 S. E. Rep. 291.

⁶ Crockett v. Drew, 5 Gray (Mass.), 399; Swan v. Horton, 14 Gray (Mass.), 179; Thorp v. Minor, 109 N. C. 152, 13 S. E. Rep. 702.

³ Sargeant v. Rowsey, 89 Mo. 617, 1 S. W. Rep. 823.

⁷ McChesney v. Haring, 14 Hun, 276; Webber v. Ward, 94 Wis. 605, 69 N. W. Rep. 349.

erned by his status at the time the suit is commenced, not at the time of the trial.¹

§ 647. Actions against infants — Guardian ad litem — Compensation.— A guardian *ad litem* occupies a relation to the court similar to that occupied by a commissioner, referee, etc. His duties are necessary to the effective administration of justice, and he is entitled, therefore, to a reasonable compensation for his services. The reasonableness of the allowance, of course, is addressed to the sound discretion of the court, and the allowance when made becomes part of the costs in the action.² But the cost incident to this representation by the guardian *ad litem* should be taxed against the infant and not against other parties in interest where the proceedings are for partition.³

§ 648. Infants are favorites with the courts and cannot be prejudiced by improper admission of guardian, attorney or other representative.— Looking with a jealous eye to the welfare of minors, the courts are ever eager to protect them from injury as far as is consistent and proper. Their very helplessness to understand the world as fully as those of mature years makes it meet that they should not be held to as strict an accountability as adults. The courts therefore never permit an infant to be prejudiced, either in person or estate, by the admissions or concessions of his guardian, or the attorney acting for the infant as the counsel for the guardian or other representative.⁴ In short, all matters and things affecting the estate of an infant in law must be strictly and regularly proven, not admitted by the guardian or other representative of the in-

¹ *Sims v. New York College*, 35 Hun, 344.

² *McCallon v. Cohen* (Tex. Civ. App.), 39 S. W. Rep. 973; *Williams v. Ewing*, 31 Ark. 229; *Walton v. Yore*, 58 Mo. App. 562; *Hutchinson v. Hutchinson*, 152 Ill. 357, 38 N. E. Rep. 926; *Ames v. Ames*, 151 Ill. 280, 37 N. E. Rep. 890; *Robinson v. Fidelity Trust & Safety Vault Co. (Ky.)*, 11 S. W. Rep. 806; *Richardson v. Van Voorhis*, 51 Hun, 636, 3 N. Y. S. 396.

³ *Holloway v. McIlhenny Co.*, 77 Tex. 657, 14 S. W. Rep. 240. And see

Richardson v. Van Voorhis, 51 Hun, 636, 3 N. Y. S. 396.

⁴ *McCloy v. Arnett*, 47 Ark. 445, 2 S. W. Rep. 71; *Evans v. Davies*, 39 Ark. 235; *Pinchback v. Graves*, 42 Ark. 222; *Moore v. Woodall*, 40 Ark. 42; *Atchison, T. & S. F. R. Co. v. Elder*, 149 Ill. 173, 36 N. E. Rep. 565; *Story. Eq. Jur.*, § 1334; *Denholm v. McKay*, 148 Mass. 434, 19 N. E. Rep. 551; *Tripp v. Gifford*, 155 Mass. 108, 29 N. E. Rep. 208; *Sparr v. Florida S. Ry.*, 25 Fla. 185, 6 S. Rep. 60; *Walker v. Redding (Fla.)*, 23 S. Rep. 565.

fant.¹ Of course, a guardian *ad litem* cannot bind an infant by improper admissions or conduct more effectively than could a regular guardian.² Nor will any omission or oversight of the infant be permitted to prejudice him. So where, for any reason, an infant omits, fails or neglects to plead, the court will not permit any advantage to be taken of this fact by his adversary, but the case will be tried just as though the infant had properly answered or otherwise pleaded, and thereby raised all available issues.³ For it is clear that to permit such advantage to be taken of the rights of an infant in litigation would, to a material extent, deprive him of the protection to which he is fully and freely entitled under the law. He is a kind of ward of the court, while his adversary is, usually, well able to take care of his own rights, or at least is presumed, so far as the law is concerned, so to be.

§ 649. Guardian ad litem — Failure to appoint — Effect. While the law requires a guardian *ad litem* or other representative to look after the rights and interests of an infant litigant, yet the failure to appoint one as required will not render a judgment recovered for or against an infant absolutely void, but only voidable.⁴ Such a judgment being only voidable, and therefore

¹ Pinchback v. Graves, 42 Ark. 222; McCloy v. Arnett, 47 Ark. 445, 2 S. W. Rep. 71; Evans v. Davies, 39 Ark. 235; Kimbell v. Miller, 54 Ill. App. 665; Tripp v. Gifford, 155 Mass. 108, 29 N. E. Rep. 208.

² Evans v. Davies, 39 Ark. 235.

³ Turner v. Short (Ky.), 3 S. W. Rep. 347; Boozer v. Teague, 27 S. C. 348, 3 S. E. Rep. 551.

⁴ Blake v. Douglass, 27 Ind. 416; McAnear v. Emerson, 54 Tex. 220; Crouter v. Crouter, 133 N. Y. 55, 30 N. E. Rep. 726; Foley v. California Horseshoe Co., 115 Cal. 184, 47 Pac. Rep. 42; Estate of Cahill, 74 Cal. 52, 15 Pac. Rep. 364; Hafferny v. Davis, 10 Wis. 501; Sabine v. Fisher, 37 Wis. 376; Young v. Young, 3 N. H. 345; Austin v. Trustees, 8 Metc. (Mass.) 196; Levynstein v. O'Brien, 106 Ala. 352, 17 S. Rep. 550; Kidd v. Mitchell,

1 Nott & McC. (S. C.) 334; Sims v. New York College, 35 Hun, 334; Smart v. Haring, 14 Hun, 276; McMurray v. McMurray, 6 N. Y. 175; Boyd v. Roane, 49 Ark. 397, 5 S. W. Rep. 704; Robinson v. Clark (Ky.), 34 S. W. Rep. 1083; Tate v. Mott, 96 N. C. 26, 2 S. E. Rep. 176; Cohee v. Baer (Ind.), 32 N. E. Rep. 920; McBride v. State, 130 Ind. 525, 30 N. E. Rep. 699; Alston v. Emmerson, 83 Tex. 231, 18 S. W. Rep. 566; Keller v. Wilson, 90 Ky. 350, 14 S. W. Rep. 332; Dahms v. Alston, 72 Iowa, 411, 34 N. W. Rep. 182; Wygal v. Myers, 76 Tex. 598, 13 S. W. Rep. 567; Eisenmenger v. Murphy, 42 Minn. 84, 43 N. W. Rep. 784; Simmons v. McKay, 5 Bush (Ky.), 25; Barber v. Graves, 18 Vt. 290; Bloom v. Burdick, 1 Hill, 130; Drake v. Hanshaw, 47 Iowa, 291; Hoover v. Kinsey Plow Co., 55 Iowa, 688, 8 N.

in force until vacated, set aside or annulled by some proper proceedings, cannot be assailed in a collateral attack.¹

A judgment against an infant who has not been properly represented by a guardian *ad litem*, or otherwise represented as the law requires, will be reversed on appeal by the infant for such an error.² And it will not be presumed on appeal in favor of the regularity of the proceedings in the trial court, where the judgment was rendered without a proper representation of the infant, that all the requirements of law were complied with. All matters necessary to give validity to a judgment, where the rights of an infant are involved, must affirmatively appear of record.³ But where an infant has not been properly served with process as the law requires, and he does not enter his appearance by his proper representative, the judgment against him will be void for want of jurisdiction of the person, and vulnerable to collateral attack.⁴ And if the appointment of the guardian *ad litem*, or other representative

W. Rep. 150; Porter v. Robinson, 8 A. K. Marsh. (Ky.) 253; Salter v. Salter, 80 Ga. 178, 4 S. E. Rep. 391; Deyton v. Bell, 81 Ga. 370, 8 S. E. Rep. 620; Parkins v. Alexander (Iowa), 74 N. W. Rep. 769.

¹ Childs v. Lauterman, 103 Cal. 387, 37 Pac. Rep. 382; Nelson v. Moon, 2 McLean, 319; Levynstein v. O'Brien, 106 Ala. 352, 17 S. Rep. 550; Burgitt v. Williford, 56 Ark. 187, 19 S. W. Rep. 750; Huggins v. Dabbs, 57 Ark. 628, 22 S. W. Rep. 563; Porter's Heirs v. Robinson, 3 A. K. Marsh. (Ky.) 254; Bloom v. Burdick, 1 Hill, 130; Patchin v. Cromach, 13 Vt. 330; Allison v. Taylor, 6 Dana (Ky.), 88; Smith v. Gray, 116 N. C. 311, 21 S. E. Rep. 200; Walsh v. Davis (Ky.), 32 S. W. Rep. 281; Cochran v. Thomas, 131 Mo. 258, 33 S. W. Rep. 6; Lemmon v. Herbert, 92 Va. 653, 24 S. E. Rep. 249; McGhee v. Romatka (Tex. Civ. App.), 47 S. W. Rep. 291; Brandon v. Carter, 119 Mo. 572, 24 S. W. Rep. 1035; Ivey v. Harrell, 1 Tex. Civ. App. 226, 20 S. W. Rep. 775; Thain v. Rudisill, 126 Ind. 272, 26 N. E. Rep. 46; Vaccaro v. Cicalla, 88 Tenn. 63, 14 S. W. Rep. 43;

McGhee v. Romatka (Tex. Civ. App.), 45 S. W. Rep. 552.

² McAnear v. Epperson, 54 Tex. 220; Cost v. Rose, 17 Ill. 276; Roberts v. Stanton, 2 Munf. (Va.) 129; Bank of the United States v. Ritchie, 8 Pet. 128; Lehew v. Brummell, 103 Mo. 546, 15 S. W. Rep. 765; McDaniel v. Correll, 19 Ill. 226; Hall v. Davis, 44 Ill. 494; Rhodes v. Rhodes, 43 Ill. 239; McDonald v. McDonald, 3 W. Va. 676; Awan v. Horton, 14 Gray (Mass.), 179; Hava v. McConnell, 93 U. S. 150; Nelson v. Moon, 3 McLean, 319; Crockett v. Drew, 5 Gray (Mass.), 393; Value v. Hart, 11 Mass. 300; Knapp v. Crosby, 1 Mass. 478; Levynstein v. O'Brien, 106 Ala. 352, 17 S. Rep. 550; Haley v. Taylor, 39 Ark. 104; Frost v. Frost, 15 Misc. Rep. 167, 37 N. Y. S. 18; Neenan v. St. Joseph, 126 Mo. 189, 28 S. W. Rep. 963; Charles v. Kelly, 120 Mo. 134, 25 S. W. Rep. 571; Moore v. Prince, 5 Tex. Civ. App. 352, 23 S. W. Rep. 1113.

³ McDonald v. McDonald, 3 W. Va. 676; Walker v. Redding (Fla.), 23 S. Rep. 565.

⁴ Hatch v. Ferguson, 57 Fed. Rep.

of the infant, be not made as the law directs, or if such representative attempts or assumes to act without being properly and legally authorized, the proceedings will be regarded as had without any representation of the infant; for, before an infant can be bound by the acts of, or service on, his guardian *ad litem* or other person, such person must act under authority of law.¹ Of course, a judgment will be binding on a minor, however, where he is represented by his curator or guardian, and the statute provides that representation by such curator shall have the same effect and validity as though the infant were an adult and had appeared in the action and submitted to the jurisdiction of the court.² But it is not very often the case that a statute confers such extraordinary powers on a representative of an infant, and such laws are calculated to make possible many frauds and injuries to infants and their property rights.

§ 650. Guardian ad litem — Qualifications.— It is of course necessary that a guardian *ad litem* who is appointed to represent an infant in any litigation should have no conflicting interests at stake or conflicting duties to perform. For then the law cannot presume which he will neglect at the expense of the other; and as the courts are always jealous of the rights of infants, a guardian who cannot act fully and freely for his temporary ward without such acts conflicting, whether favorably or not, with the duties he owes his ward, should not be appointed, otherwise important rights of the infant might be jeopardized.³

§ 651. Guardian ad litem — Duty of.— It is the duty of a guardian *ad litem*, as well as of a regular or statutory guardian, to faithfully look after and protect the rights and interests of the infant whom he represents. It is the duty of such guardian

966; *Wheeler v. Ahrenbeak*, 54 Tex. 535; *Kremer v. Haynie*, 67 Tex. 450, 3 S. W. Rep. 676; *Ellis v. Stewart* (Tex. Civ. App.), 24 S. W. Rep. 585; *Terrell v. Weymouth*, 32 Fla. 255, 13 S. Rep. 429.

¹ *Kremer v. Haynie*, 67 Tex. 450, 3 S. W. Rep. 676; *Hatch v. Ferguson*, 57 Fed. Rep. 966; *Keys v. Ellensohn*,

72 Hun, 392, 25 N. Y. S. 693; *Deboshmutt v. Parent*, 39 Kan. 548, 18 Pac. Rep. 712.

² *Payne v. Masek*, 114 Mo. 631, 21 S. W. Rep. 751.

³ *Estes v. Bridgforth* (Ala.), 21 S. Rep. 514. And see as analogous, *Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. Rep. 1052.

to file an answer in behalf of the infant, and therein to deny all the material allegations of the pleadings of the adverse party and make every legitimate defense he knows of and can make by careful and faithful attention to his duties.¹ But should the guardian acting for the infant so far exceed his authority and ignore his duty as to admit in his pleadings, or in the progress of the trial in which an infant is concerned, anything to the detriment or prejudice of the infant, this will not be permitted to injure the rights of the ward.²

§ 652. Guardian ad litem — Appointment — Requisites.— There is no particular formality required in the matter of appointing a guardian *ad litem*. Generally this is effected by an order of the court in which the proceeding is pending, properly appearing of record in the case. This would ordinarily be the manner unless some particular mode is pointed out by the local statute. Indeed, it has been held, with good reasoning, that where a person appears for an infant and is recognized by the court as so appearing, and he is a proper person and qualified to act, that this tacit recognition of him by the court will be tantamount to an appointment and serve the same purpose as an order to that effect duly entered of record.³

§ 653. Action against infants — Guardian ad litem — Appointment of — Record recitals.— Generally, where the record of a trial shows that a guardian *ad litem* was appointed for an infant defendant, and that such guardian *ad litem* answered and otherwise performed his duties as the law directs, the decree or judgment cannot be assailed in a collateral proceeding on the ground that there was no proper representation of the infant, unless there be some fraud or collusion practiced to the prejudice of the infant in procuring the judgment.⁴ This

¹ Evans v. Davis, 39 Ark. 235; Pillow v. Sentelle, 39 Ark. 62; Varner v. Rice, 44 Ark. 236; Skaggs v. Kincaid, 48 Ill. App. 608; Stunz v. Stunz, 131 Ill. 210, 23 N. E. Rep. 407.

² Driver v. Evans, 47 Ark. 297, 1 S. W. Rep. 518; Aiken v. Catlin, 48 La. Ann. 877, 19 S. Rep. 929; Chipman v. Union Pacific Ry. Co., 12 Utah, 68, 41 Pac. Rep. 562; White v. Miller, 158 U. S. 28, 15 Sup. Ct. Rep. 788; Wright

v. Miller, 1 Sandf. Ch. 103; Mills v. Dennis, 3 Johns. 367.

³ Tanner v. Ames' Estate (Tex. Civ. App.), 37 S. W. Rep. 373.

⁴ Beddinger v. Smith (Ark.), 13 S. W. Rep. 734; Benjamin v. Bingham, 50 Ark. 433, 8 S. W. Rep. 188; Bent v. Maxwell, L. & G. Ry. Co., 3 N. M. 158, 3 Pac. Rep. 721; Allen v. Allen (S. C.), 26 S. E. Rep. 786.

is upon the principle that, in the absence of a showing to the contrary, the proceedings of a superior court of record will be presumed regular until the contrary appears.

§ 654. Authority of guardian *ad litem* and next friend.—While it is well established that a guardian *ad litem*, or other guardian, next friend, or representative of an infant, cannot do, omit or waive anything to the material prejudice of the rights of his infant litigant, yet there are many merely formal things which may be effectively done by these representatives. It has been held, therefore, that a guardian *ad litem* can consent, on behalf of the infant, to a change of venue of the case to another jurisdiction.¹ The representative of the infant may usually do any act, or comply with any formality or proceeding, so long as no material right of the infant is thereby jeopardized.² It has been held where an infant is properly brought into court and represented by a guardian *ad litem*, who consents to a judgment in the case which is clearly for the benefit of the infant, that it will not be vacated on the plea that the representative of the infant had no authority to assent to it.³ If an infant has arrived at the age of discretion he may make his own affidavit for change of venue, or other affidavit required in his case, though he is represented by guardian or next friend.⁴

§ 655. Limitations of the authority of guardian and next friend.—Upon the recognized principle that a guardian *ad litem* or next friend cannot prejudice an infant by any act, it is correctly held that a next friend appointed by the court to represent an infant in any litigation has no authority to compromise the case in behalf of the infant.⁵ A guardian *ad litem* cannot consent to a judgment against an infant;⁶ nor can a

¹ Lemmon v. Herbert, 92 Va. 653, 24 S. E. Rep. 249.

² Kingsbury v. Buckner, 134 U. S. 650, 10 Sup. Ct. Rep. 638; Tripp v. Gifford, 155 Mass. 108, 29 N. E. Rep. 208.

³ Morris v. Virginia Ins. Co., 85 Va. 588, 8 S. E. Rep. 383.

⁴ Albert v. State, 66 Md. 325, 1 Atl. Rep. 697.

⁵ Johnson v. McCann, 61 Ill. App. 110; Coughlin v. Fay, 68 Hun, 521, 22 N. Y. S. 1059; Isaacs v. Boyd, 5 Port. (Ala.) 388; Crotty v. Eagle, 35 W. Va. 143, 13 N. E. Rep. 59; Clark v. Crout, 84 S. C. 417, 13 S. E. Rep. 602; Miles v. Kaigle, 10 Yerg. (Tenn.) 10.

⁶ Morgan v. Morgan, 45 S. C. 323, 23 S. E. Rep. 64.

general guardian;¹ nor can an attorney employed by the guardian or next friend to represent the interests of the infant.² An attorney thus employed cannot delegate any authority he may have received in being retained by the guardian or next friend to look after the rights of the infant in the litigation to another attorney.³ Attorneys thus employed, of course, can have no greater authority than the next friend or guardian employing them, as no one can delegate greater authority than he possesses. The next friend or guardian cannot fix a liability upon the infant for the services of an attorney thus employed;⁴ nor can the next friend collect and receipt for a judgment in favor of an infant unless authorized by statute, the statutory guardian being the person to whom payment should be made.⁵

§ 656. Domicile of infants.—As every one must have a domicile, it follows that an infant, just as other persons, likewise must. But an infant can do few acts in law which are binding on him; therefore, with reference to his domicile, as well as to other rights of an infant, the law fixes this status, and deems the domicile of the parents of the child the domicile of the infant.⁶ If the domicile of the parent at the time of his death is different from that at the time of the birth of the infant, the infant will take the last domicile of the parent.⁷ But if the father be dead and the mother alive, the domicile of the infant goes thereafter with the mother until her death.⁸ But if the father is living, the domicile of the infant follows that of the father; and this is true, though the infant be born out of the country in which the father resides.⁹ In case of the

¹ *Bearinger v. Pelton*, 78 Mich. 100, 43 N. W. Rep. 1042.

² *Crotty v. Eagle's Adm'r*, 35 W. Va. 143, 13 S. E. Rep. 59.

³ *Crotty v. Eagle's Adm'r*, 35 W. Va. 143, 13 S. E. Rep. 59.

⁴ *Houck v. Bridewell*, 28 Mo. App. 644.

⁵ *Gulf, C. & S. F. Ry. Co. v. Younger* (Tex. Civ. App.), 45 S. W. Rep. 1030.

⁶ *Allgood v. Williams* (Ala.), 8 S. Rep. 722; *School Directors v. James*, 2 W. & S. (Pa.) 568; *Johnson v. Turner*, 29 Ark. 280; *Kennedy v. Rayal*, 67 N. Y. 379; *Ferrie v. Public Admin-*

istrator, 3 Bradf. 151; *Alexandria v. Bethlehem*, 1 Harrison, 119; *Jacobs, Domicile*, § 205; *Hardy v. De Leon*, 5 Tex. 211.

⁷ *City of Louisville v. Sherley*, 80 Ky. 71; *Mills, Guardian, v. Hopkinsville* (Ky.), 11 S. W. Rep. 776; *Cumner Parish v. Milton Parish*, 3 Salk. 259; *Daniel v. Hill*, 52 Ala. 430.

⁸ *School Directors v. James*, 2 W. & S. (Pa.) 568; *Woodward v. Woodward*, 3 Pick. (Tenn.) 644, 11 S. W. Rep. 892.

⁹ *Shanks v. Duport*, 3 Pet. 242; *Grimmett v. Witherington*, 16 Ark.

death of the father, the infant takes the mother's domicile; but this cannot be changed by the act of the mother in marrying again and taking up an abode with her new husband. Her legal existence is then blended in his, and the infant keeps the domicile he had at the time of marriage until he becomes *sui juris*, or perhaps until his status is changed by a guardian under the sanction of a court having jurisdiction of the infant's person and estate.¹ It has been held that where infants whose parents are dead take up their permanent abode with their grandparents, the domicile of such adopted parents becomes that of the infants.² But it is also held that the fact that the father, whose domicile as long as he lives is that of the infant, gives the child to a relative, at the time of his death, to raise and bring up, will not change the domicile of the infant which it has acquired through its father.³ Doubtless the correct rule is, the parental domicile attends the child until he becomes *sui juris*. No one ordinarily but the father, or the mother if the father be dead, can change the domicile of the infant. Its rights under the law, therefore, must be determined under the laws of the domicile of its father or mother, as the case may be, and these rights include the right to own, control or alien property, to look to his parents for support, to marry, and all other rights.⁴

§ 657. Power of infant to change domicile.—An infant cannot, by his own act or determination, change his domicile of origin, which the law fixes as that of his father. An attempt to do so by removing to another state or by any other act is fruitless, and would not affect the right of his statutory guardian to exercise authority over the infant given by the laws of the domicile of the father.⁵ And on the other hand, a guardian of an infant, who is domiciled in a state other than that in which the guardian lives, cannot change the domicile of the

877; Story, Conf. Laws, § 46; Somerville v. Somerville, 7 Ves. Jr. 750; Jacobs, Domicile, § 105.

¹ Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. Rep. 221.

² Lamar v. Micou, 114 U. S. 218, 5 Sup. Ct. Rep. 857.

³ Allgood v. Williams (Ala.), 8 S. Rep. 722.

⁴ Woodward v. Woodward, 8 Pick. (Tenn.) 644, 11 S. W. Rep. 892; Story, Conf. Laws, §§ 64-66.

⁵ Grimmett v. Witherington, 16 Ark. 377; Mears v. Sinclair, 1 W. Va. 185; Somerville v. Somerville, 5 Ves. Jr. 750, 763.

ward from the state where it was acquired from the father to another.¹ An infant retains the domicile of its parent whether he actually live with the parent or not. And where a girl ten years old remained in the state of the domicile of her parents for ten years after they had gone permanently to another, where she attended school most or all the time, making only occasional visits to her parents by spending a short time each year with them, her domicile is still the same as that of her parents.² Nor will the fact that such infant, after the death of her parents, takes up her abode with her grandparents, who provide for and support her, and who spend about half their time visiting at various places, change the status of the infant child thus acquired.³ After the death of the father, the infant *ipso facto* takes the domicile of the mother, and, as often as the domicile of the mother thereafter changes, so often will that of the infant change.⁴ But the change of domicile in the mother must be done in good faith, otherwise the domicile of the infant will remain the same.⁵ The rule that an infant can not change his domicile is obviously a wholesome one; and were it not for the rule, the will of the infant, who is supposed in law to be too young to exercise such an important discretion, would prevail over the will of the father. Important legal rights might depend upon the question of domicile, which an infant might control by determining for himself where his domicile should be.

§ 658. Domicile of infants — Abandonment by parents.—

While the right of the parents to fix the status and domicile of their children is generally recognized, there are cases where this right is or may be forfeited. The parent must be such in fact and deed; and if he ceases to so act, as when he abandons his child, this right of the parent no longer exists. So, a child abandoned by its parents who seeks subsistence and a home with others more kind-hearted and charitable, and is by such people taken into their home and given the necessities of life, as well as the care necessary for one of tender years, will

¹ Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. Rep. 221.

² Dresser v. Edison Illuminating Co., 49 Fed. Rep. 257.

³ Dresser v. Edison Illuminating Co., 49 Fed. Rep. 257.

⁴ Dedham v. Natick, 16 Mass. 134; Pottinger v. Wightman, 3 Mer. 67.

⁵ Pottinger v. Wightman, 3 Mer. 67.

thereby acquire the domicile of such adopted parents in preference to that of the father. The domicile of the child follows that of the parent only so long as the parent is worthy of the name.¹ Nor can the parent who has thus forfeited his right to fix the child's status change the domicile by forcibly taking the child from its protection and carrying it to another state or country.² Of course this rule must be received with caution. The primary object is the welfare of the child; but the courts should not closely scan the manner in which a parent provides for his child, because of necessity this must be, to a great extent, within the discretion of the parent, as well as within his means.

§ 659. Domicile of infants — Status of — Right of state to prescribe.— The laws governing the adoption of children, their status in society, their domicile, and their rights and duties generally, are matters within the reasonable powers of government. And to ascertain these rights it is necessary to look to the domicile of the person to be affected. This ascertained, his status will be determined by the laws of the country where he is at the time domiciled.³ “Every state has an undoubted right to determine the status or domestic and social condition of the persons domiciled within its territory, except in so far as the powers of the states in this respect are restrained or duties and obligations imposed upon them by the constitution of the United States.”⁴

§ 660. Domicile — Status of parties — Conflict of laws.— The status of an infant or other person fixed by the laws of the state or country where he is domiciled will be recognized in all other places. Thus where an English lady, being under twenty one years of age, was married, under royal sanction, to the Count of Vianna of Portugal, thereafter taking up her abode in that country with her husband, and being the heir to a fund left her in the Bank of England as residuary legatee, the ecclesiastical court held that she was entitled to have the same

¹ In re Vance, 92 Cal. 195, 28 Pac. 441; Ross v. Ross, 129 Mass. 243; Rep. 229. Jacobs, Domicile, § 32.

² In re Vance, 92 Cal. 195, 28 Pac. Rep. 229. ⁴ Strader v. Graham, 10 How. (U. S.) 82, 93; Woodward v. Woodward, 3

³ Undy v. Undy, L. R. 1 H. L. Sc. Pickle (Tenn.), 644, 11 S. W. Rep. 892.

paid to her, and that her receipt therefor was a sufficient acquittance, though if she had been domiciled in England this would not have been lawful until she had arrived at the age of twenty-one years. But it was shown by proper evidence that under the laws of Portugal her disabilities as an infant had ceased.¹

§ 661. Domicile — Adopted children.— The question of the true domicile of an infant may be difficult of ascertainment. The familiar rule that the domicile of the child follows that of the father, or, if the father be dead, that of the mother, is easy enough of solution. But in comparatively late years many of the states have passed laws investing children who have been adopted in a prescribed manner with very general rights and corresponding duties. These are little short of the rights and duties of the children of natural parents. These adopted children become a part and parcel of the families into which they are received. In some cases they may take the name of the adopted parents, and usually they become joint heirs with other natural children; or, if these be lacking, they become sole and exclusive heirs at law of their new parents. The question of the domicile of children thus situated is necessarily important, and is usually more difficult of ascertainment than in the case of natural children. Ordinarily, where an infant has no father or mother, its domicile will be that of the last living parent at the time of death. This domicile, inherited by the child, as it were, cannot, generally speaking, be changed by the act of a stranger. But this is not necessarily the case where, by virtue of these statutory innovations upon the common law, a new parent is supplied, as an artificial limb is supplied the body in case of the loss of the natural one. To all practical purposes, the parent thus substituted by law stands, or is supposed to stand, in as near and important a relation as the natural parent. The blood relationship is, of course, lacking, as is the natural and paternal love of the true parent. The new parent, not having by nature this affection for his adopted heir, is not apt to have the same anxious regard for its welfare and general good. But the law, in its solicitous regard for the good of all its citizens,

¹ In *re Goods of Countess De Cunha*, v. Woodward, 3 Pickle (Tenn.), 644, 1 Hag. Ecc. 237. And see Woodward 11 S. W. Rep. 892.

and especially for those who are helpless and without counsel and parental sympathy, has sought to do the next best thing for those who are so unfortunate as to be deprived of their natural parents. What, then, is the status of a child thus adopted, in regard to its domicile? So long as the domicile of the adoptive parent is the same as that of the child at the time of adoption, the question implies the answer. But when the new parent changes his domicile, does the domicile of the adopted child follow that of such parent and become one with it? The direct question came before the supreme court of Tennessee in the case of *Woodward v. Woodward*.¹ By statute in this state there is no restraint whatever upon the power and authority of the new parent over his adopted child, he being given such authority over his new heir as the natural parent would have had, except that he does not inherit from the child as the natural parent might do.² In this case a child, domiciled in Tennessee, was adopted in conformity to the statute by a person who at the time likewise had a domicile in that state. Subsequent to the adoption of the child, the parent, in perfect good faith, removed with the child to the state of Louisiana, taking up his permanent abode and home in that state. The court, after careful and thoughtful consideration, in a very able and satisfactory opinion by Folks, J., held that the change of domicile effected by the removal of the adoptive father likewise, *ipso facto*, changed that of the child; and this, too, though the rule in this state is that a guardian cannot change the domicile of his ward, thus placing an adoptive parent on a higher footing than a statutory guardian.³

¹ 3 Pickle (Tenn.), 644, 11 S. W. Rep. 892.

² "The effect of such adoption, unless restrained by the decree, is to confer upon the person adopted all the privileges of a legitimate child to the applicant, with capacity to inherit and succeed to the personal and real estate of such applicant as heir and next of kin; but it gives to the person seeking the adoption no mutual right of inheritance and succession, nor any interest whatever in the estate of the person adopted."

Woodward v. Woodward, 3 Pickle (Tenn.), 644, 11 S. W. Rep. 892. See Mill & V. Code (Tenn.), § 4390.

³ Touching this point the court say: "One of the privileges of a legitimate child is to acquire a new domicile for itself when its father acquires one in the place to which they have removed. Here the adoptive father had, unquestionably, the right to carry the child, as a member of his family, to his new home. Is she to be held to submit to removal from the state of Tennessee and yet

§ 662. **Capacity of infant to make a will.**—As an infant has not capacity to make a valid contract, it naturally follows that the same principles which disable him from making a contract in the ordinary affairs of life will preclude him from making a final disposition of his estate in contemplation of death.¹ It is rarely if ever the case that infants are permitted by law to dispose of realty by bequest at the present day. It is frequently the case, however, that they are authorized by statute, when they shall have attained a certain age, usually about eighteen, to dispose of their personal property by will. But for their authority so to do and the extent thereof resort must be had to the statutes regulating the powers of infants.² By the old common-law rule infants of the age of fourteen were competent to dispose of their personal property by will.³ This, however, was, more strictly speaking, the rule of the civil law, which was followed by the ecclesiastical courts of England, and was recognized in an indirect way by the law courts, because all matters affecting the capacity of any person to bequeath property was within the jurisdiction and authority of the spiritual courts.⁴ But if it should be made to appear to the spiritual court that the infant at the time of making the will had not developed sufficient intelligence and understanding to appreciate the nature or effect of his act, the will would not be

deprived of the privilege of acquiring a domicile in the state to which she is removed? It is a privilege, and one which might be of great advantage and benefit to a child under many circumstances that readily suggest themselves. Are we, in a strained effort to protect petitioner from what we can imagine may be an evil to her, to deprive her of the privileges which her relationship to the adoptive father gives her under the statute? And here it may be asked, how could we expect the courts of Louisiana to recognize the status of heir which the proceedings in Tennessee stamped upon her when she was domiciled here, were we to refuse to recognize the status of full age which the proceedings in that state have stamped upon her? Under

the law that would be established if defendant's contention here were to prevail, and the *lex talionis* be applied, the courts of Louisiana would refuse to recognize the petitioner as the heir of her adoptive father, her only claim thereto resting upon the status given by the laws of Tennessee." *Woodward v. Woodward*, 3 Pickle (Tenn.), 644, 11 S. W. Rep. 892.

¹ Schouler, Wills (2d ed.), § 39.

² See generally *Campbell v. Browder*, 7 Lea (Tenn.), 240; *Wells v. Seeley*, 47 Hun, 109; *Moore v. Moore*, 23 Tex. 637.

³ *Dean v. Littlefield*, 1 Pick. (Mass.) 239; 2 Bl. Comm. 497; *Holyland, Ex parte*, 11 Ves. 10.

⁴ 2 Bl. Comm. 497; *Smallwood v. Brickhouse*, 2 Mod. 315; *Dean v. Littlefield*, 1 Pick. (Mass.) 239.

permitted to stand.¹ This old rule has been superseded by statute in England, and very generally modified or supplanted by the local laws in the various states.

§ 663. Children as witnesses.—Generally, when an infant of comparatively tender years is offered as a witness, the courts exercise great caution in permitting him to testify. This is partly because of the fact that a young child may not fully understand the nature and solemnities of an oath. Another reason is, the consequences of the infallibility of such testimony may involve life and death, liberty, or valuable property rights. Upon these principles, then, the courts always scrutinize carefully the understanding of a very young child before permitting his testimony in any cause, civil or criminal. Nor does the importance or insignificance of the case in which the child is offered as a witness make the rule of admissibility of the evidence different. Under most if not all of the various state constitutions, before a witness can be adjudged competent to testify, he must believe in the existence of a Supreme Being to whom he must finally account for the giving of false testimony “against his neighbor.” It is manifest that a child of tender years can, as a rule, have little if any accurate conception of such a being, though there have been instances where the child’s comprehension of such matters was exceptional. Very few, if any, adjudged cases are to be found where a child under four years of age has been permitted to testify in any court, for, under this age, the presumption of their ignorance of the nature, obligation and consequences of an oath must necessarily be limited, aside from which consideration might well also be added the unreliability of such testimony, because of the immature state of the mind of one so young. Rare instances of the competency of children under four years of age might be imagined, however. For example, if a child has been recently stolen from its mother or father and is claimed by the wrongdoer, it might be permitted to choose to which claimant it would go, and its manifestations of satisfaction or affection with the one or the other would be some evidence that it had been trained to love one or the other claimant.²

¹ 2 Bl. Comm. 479.

relation of “master and servant” be-

² A rather novel instance of an analogous case was one involving the relation of a dog and its alleged owner. The dog was permitted to be brought

§ 664. **Children as witnesses — Age at which they may testify.**— Usually, after a child arrives at the age of four years, he may, if found of sufficient intelligence and understanding, be permitted to testify as a witness in any case. This degree of intelligence should be ascertained by the trial judge by an examination of the child, which should be done by the court, not by a jury. The question of competency is one addressed to the sound discretion of the court, and its determination upon such examination is final, except where the discretion is palpably or clearly abused.¹ And in the absence of a contrary showing, an appellate court will presume that the *nisi prius* judge resorted to the proper methods of ascertaining the competency of the child before permitting his evidence to be introduced.² The correct rule for determining the necessary intelligence of the child is the sense and reason he manifests of the consequences and corruption of swearing falsely, brought out by proper questions which would naturally and necessarily elicit the desired information.³ And when the trial judge has thus determined the question of competency, the rule that his discretion will not be controlled on appeal is the same whether he determines in favor of the competency or against it.⁴ And the proper way to test the competency of a witness whose age is

into court and placed where he could notice either claimant, to the end that its actions might be observed in determining which one he had been accustomed to honor as his master. This was an incident of a trial in the United States circuit court for the western district of Arkansas.

¹ *Ridenhour v. Kansas City Cable Ry. Co.*, 102 Mo. 270, 13 S. W. Rep. 889; *Minton v. State* (Ga.), 25 S. E. Rep. 626; *Commonwealth v. Mullins*, 2 Allen (Mass.), 295; *State v. Michael*, 37 W. Va. 565; *State v. Manuel*, 64 N. C. 601; *Hawkins v. State*, 27 Tex. App. 273; *State v. Edwards*, 79 N. C. 648; *Moore v. State*, 79 Ga. 498; *State v. Sawtelle*, 66 N. H. 488; *Blackwell v. State*, 11 Ind. 196; *State v. Doyle*, 107 Mo. 36; *Davis v. State*, 31 Neb. 247, 47 N. W. Rep. 854; *Wheeler v. United States*, 159 U. S. 523, 16 Sup.

Ct. Rep. 93; *Davidson v. State*, 39 Tex. 129; *State v. Levy*, 23 Minn. 104; *Missouri, K. & T. Ry. Co. v. Johnson* (Tex. Civ. App.), 37 S. W. Rep. 771; *State v. Juneau*, 88 Wis. 180, 59 N. W. Rep. 580. In this last case the child was four years and nine months old when the offense of which she was permitted to testify occurred, and at the time of testifying was five years and five months of age.

² *Wheeler v. United States*, 159 U. S. 523, 16 Sup. Ct. Rep. 93.

³ *White v. Commonwealth*, 96 Ky. 180, 28 S. W. Rep. 340; *State v. Juneau*, 88 Wis. 180, 59 N. W. Rep. 580; *McGuff v. State*, 88 Ala. 147, 7 S. Rep. 35; *Wheeler v. United States*, 159 U. S. 523, 16 Sup. Ct. Rep. 93; 4 Bl. Comm. 214.

⁴ *Peterson v. State*, 47 Ga. 524.

challenged is to object to him, for this reason, when he is offered as such. The court will, upon such objection being made, proceed to ascertain the question of competency, and permit or refuse the testimony of the child according to the conclusion reached.¹ If the party wishing to exclude the evidence of the child should fail to thus seasonably object, he would be precluded from afterwards complaining; for, were it not so, he might experiment on the evidence, and, if found favorable to him, waive objection; if not, move its exclusion. This would be allowing an unfair advantage.²

§ 665. Testimony of children — Rule of the common law — Presumptions.— The common-law rule is, an infant who has attained the age of fourteen years is presumed to have sufficient understanding to be competent as a witness until the contrary is made to appear. But under that age no such presumption exists; “therefore inquiry is to be made as to the degree of understanding which the child offered as a witness may possess, and, if he appears to have sufficient natural intelligence, or to have been so instructed as to comprehend the nature and effect of an oath, he is admitted to testify no matter what his age may be.”³ If the promise to tell the solemn truth is made under the immediate sense of the witness’ responsibility to his Maker, and with the conscientious comprehension of the wickedness, corruption, evil and danger of falsehood, this is all that is usually necessary to entitle a young child to testify as a witness in a case, whether civil or criminal.⁴ In a recent Kentucky case it is held that “the intelligence of the witness is the true test of competency and that it must be determined by the court. . . . A child may be ignorant of God and of the evil of lying, and of the punishment prescribed therefor, both

¹ State v. Levy, 23 Minn. 104.

² Mills v. State (Ga.), 30 S. E. Rep. 778.

³ 1 Greenl. Ev., § 387; 1 Hale, P. C. 302; Commonwealth v. Hutchinson, 10 Mass. 224; State v. Morea, 2 Ala. 275; Blackwell v. State, 11 Ind. 196; State v. Richie, 28 La. Ann. 326; Givens v. Commonwealth, 20 Gratt. (Va.) 830; Kelly v. State, 75 Ala. 21; Wade v. State, 79 Ga. 498; Vincent

v. State, 3 Heisk. (Tenn.) 120; People v. Bernal, 10 Cal. 66; State v. Denio, 19 La. Ann. 119; Commonwealth v. Carey, 2 Brewst. (Pa.) 404; Draper v. Draper, 68 Ill. 17; Carter v. State, 63 Ala. 52. See also Jackson v. Gridley, 18 Johns. 98; Bowers v. Kannady, 94 Ga. 209, 21 S. E. Rep. 458.

⁴ McGuff v. State, 88 Ala. 147, 7 S. Rep. 35.

here and hereafter, and yet have a sufficient intelligence to truthfully narrate facts to which its attention is directed.”¹ It would certainly seem that the learned court goes far enough in this case, considering it from the standpoint of the general rule that before any witness is competent to testify he must believe in a Supreme Being, to the end that his conscience may be effectively bound and the importance of the truth impressed upon his mind by the fear of divine punishment of perjury. But it seems that in Kentucky, by express constitutional enactment, “all persons are competent as witnesses so far as any religious test is concerned.”² So it is held in Maine that the credit due to the statement of a witness of tender years should be left to the jury, and that there is no limit to the age at which a trial judge might permit a witness to go on the stand.³ But this is not the correct rule; for, if it be true, the judge might permit a child to testify by reason of whose tender age it would naturally and necessarily be absolutely incompetent to give reliable testimony; as, for instance, a child of only two or three years, to testify with like effect as an older person should the jury see fit to so regard his testimony. The correct rule is, the child is not to be permitted to testify at all until judicially ascertained to have sufficient intelligence and knowledge of the responsibility of a witness to his neighbor and his God; and to leave the question of weight to be given his evidence to the jury, regardless of his age or competency, is reversible error.⁴ After the court determines that the child is competent to testify, however, the weight to be given his evidence is then a question for the jury, just as would be the case of any other competent witness.⁵

§ 666. Children as witnesses — Duty of court to ascertain competency.— When a child of tender years is offered as a witness it is the duty of the court to satisfy itself of the com-

¹ *White v. Commonwealth*, 96 Ky. 180, 28 S. W. Rep. 340. E. Rep. 803; *People v. Bernal*, 10 Cal. 66. And see *Blackwell v. State*, 11

² *Bush v. Commonwealth*, 80 Ky. 244. Ind. 196.

³ *State v. Whittier*, 21 Me. 341.

⁴ *Hughes v. Detroit, G. H. & M. Ry. Co.*, 65 Mich. 10, 31 N. W. Rep. 603; *State v. Michael*, 37 W. Va. 565, 16 S. E. Rep. 372. ⁵ *White v. Commonwealth*, 96 Ky. 180, 28 S. W. Rep. 340; *State v. Whittier*, 21 Me. 341; *Washburn v. People*, 10 Mich. 372.

petency of the child before permitting him to testify. It is usual, however, when a young child is offered as a witness, for the party who may wish to object to the competency of the witness to raise the objection before the child is sworn; at least before he actually testifies. Otherwise the want of competency, as a general rule, would be considered as waived, for parties, if they choose, may try their cases on incompetent testimony.¹ And it is not for the witness to say whether he is competent to testify or not. Neither he nor the parties have any right to determine any question in the case which the law vests exclusively in the court. So the witness, however incompetent he may think himself to testify, must do so if required by the court.² But while it is proper for the court to ascertain the competency of a child witness before permitting him to testify, yet it is not reversible error, if error at all, to permit such testimony without a previous examination, where the child, during the progress of his examination as a witness, exhibits a sufficient comprehension and understanding of the nature of an oath, its solemnities and consequences.³

§ 667. Children as witnesses—Discretion of court in allowing witness to be instructed.—It does not necessarily follow that a witness may not testify because, being of tender age, he does not fully understand the nature and obligation of an oath. If the child has such intelligence as appears to the court to be susceptible of instruction on the necessary information, the court may instruct the young witness, or have it done under its strict direction. And when the witness is thus sufficiently informed as to the nature and consequences of the obligation of an oath, he may, in the discretion of the trial judge, be permitted to testify.⁴ It is within the discretion of the court to continue a case in which a very young child is an important witness with directions that the child be properly instructed as to its duty and responsibility as a witness.⁵ This is some-

¹ *Watson v. Simmons*, 91 Ala. 567; *Higdon v. Kennemer* (Ala.), 20 S. Rep. 470; *Mills v. State* (Ga.), 30 S. E. Rep. 778.

² *Moore v. State*, 79 Ga. 498, 5 S. E. Rep. 51; *State v. Michael*, 37 W. Va. 565, 16 S. E. Rep. 803.

³ *State v. Douglas*, 53 Kan. 669, 37 Pac. Rep. 172.

⁴ *Commonwealth v. Lynes*, 142 Mass. 577, 8 N. E. Rep. 408.

⁵ *Holst v. State*, 23 Tex. App. 1, 3 S. W. Rep. 757; *Commonwealth v. Lynes*, 142 Mass. 577, 8 N. E. Rep. 408.

times necessary in order to avert a miscarriage of justice, and is a matter over which the sound and just discretion of the court dominates.

§ 668. Testimony of children—Instances where child held competent to testify.—In a murder case where the question of the guilt or innocence of the accused hinged upon the testimony of a girl of twelve years, a conviction was sustained, she having been shown to be truthful and intelligent.¹ And where a boy witness on his *voir dire* stated that he knew the difference between truth and falsehood; that if he told a lie he would go to “the bad man,” and that he was going to tell the truth, he was held a competent witness in a capital case, though but five and a half years of age.² A boy of thirteen, possessing fair intelligence and understanding the difference between telling the truth and a falsehood, and comprehending the orthodox idea of future rewards and punishments, is a competent witness to testify, though he did not know what would be done with him for swearing falsely, but knew he was sworn to tell the truth; that it was wrong to tell or swear a lie, and that if he told or swore a lie he would go to “the bad place.”³ A child only four years and nine months old when the facts about which she testified took place, and who was five and a half years of age when she was offered as a witness, has been held competent to testify, having been found first to possess the necessary intelligence.⁴ A girl eight years old who had been to school, and who, upon being examined as to her competency, stated that she knew she should tell the truth, and that if she did not, God would punish her, has been held competent to testify.⁵ A child of thirteen is competent to testify where she knows it is wrong to swear falsely, and who is properly instructed by the court as to the consequences of perjury.⁶ So an infant ten years of age who has been taught that it is wrong to tell a lie and

¹ Warner v. State, 25 Ark. 447.

v. Freeny, 80 Md. 406, 31 Atl. Rep.

² Wheeler v. United States, 159 U. S. 523, 16 Sup. Ct. Rep. 93. To like effect see, too, Logston v. State, 3 Heisk. (Tenn.) 120; Draper v. Draper, 68 Ill. 17.

304.

⁴ State v. Juneau, 88 Wis. 189, 59 N. W. Rep. 580.

⁵ State v. Sawtelle, 66 N. H. 488, 32 Atl. Rep. 831.

³ Payton v. State, 35 Tex. Cr. Rep. 508, 34 S. W. Rep. 615. See too Freeny

⁶ McAmore v. Wiley, 49 Ill. App. 615.

that those who swear falsely will be punished is competent.¹ A negro child who was the chief prosecuting witness in a felony case, upon being asked on her *voir dire* what would become of her if she should swear falsely, replied that she would go to jail here and to hell when she died. The court very properly thought that "there is no better test as to apprehended results of falsehood."² A child eight years old who understands that she is brought to court to tell the truth, that it is wrong to tell a lie, and that if she does she will be punished, is a competent witness.³

§ 669. Testimony of children — Instances of inadmissibility.— While the courts are always ready, under due restrictions, to admit the evidence of one of tender years where a sufficient understanding of the nature and consequences of an oath are shown, yet the rule is never carried to extremes, and very properly should not be. The grave consequences of the admission of testimony of an unreliable nature, because of the inability of the witness to fully know or understand the full nature and consequences of his act, make it necessary that the rule be not extended beyond due bounds. So a witness five years old only, who has no conception of the Deity or a future state of rewards and punishment, is not competent to testify, though in answer to questions propounded to her by the court she stated that if she should testify falsely she would go to jail and the bad man would get her.⁴ A child in her sixth year at the time of the happening of the events of which she was offered to testify as a witness, and barely seven at the time of the trial,

¹ *People v. Linzey*, 79 Hun, 23.

² *Comer v. State* (Tex. Cr. Rep.), 20 S. W. Rep. 547.

³ *State v. Levy*, 23 Minn. 104. See also *Davidson v. State*, 39 Tex. 129; *State v. Doyle*, 107 Mo. 36, 17 S. W. Rep. 751; *State v. Severson*, 79 Iowa, 750, 45 N. W. Rep. 305; *Davis v. State*, 81 Neb. 247, 47 N. W. Rep. 854. In Missouri a statute provides that "a child under ten years of age incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly,"

is not competent to testify. Under this law it is held that a child not ten years old is presumptively incompetent to testify, but may be shown, nevertheless, to possess the requisite intelligence. *Ridenhour v. Kansas City C. Ry. Co.*, 102 Mo. 270, 13 S. W. Rep. 889. And see, further, *Hawkins v. State*, 27 Tex. App. 273.

⁴ *State v. Michael*, 87 W. Va. 565, 16 S. E. Rep. 803; *Beason v. State*, 72 Ala. 191. And see *Donnelley v. Territory* (Ariz.), 52 Pac. Rep. 368.

who did not know when she was sworn; did not know how old she was; had never been to school; did not know what would be done with her if she should tell a story in court, nor where she would go if she should be a bad girl and die, was held incompetent for lack of understanding under a statute providing that "children or other persons who, after being examined by the court, appear not to possess sufficient intelligence to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath," are not competent to testify.¹ Where a child but little over nine was offered as the principal witness in a murder case, and whose evidence was properly objected to at the time; who was deaf, and the transactions he was to testify of occurred about a year before; who had never been to school for the deaf and dumb; did not know what would be done with him if he should testify falsely, and could not be made to understand that he would be punished for so doing, he was held to be an incompetent witness.² And when a child upon examination is found not to be competent as a witness for want of the necessary understanding, it is grossly improper for the witness to be taken in charge by one party to the action, and, in the absence of the other, instructed by such party, not under the direction of the court; and it is error to admit the testimony of the child after having been thus instructed by one side only and out of court.³ Where by statute all infants under ten years of age are made incompetent to testify, an infant under this age cannot become a witness, no matter how intelligent nor how fully he may understand and appreciate the nature and obligation of an oath.⁴

§ 670. Liability of infants for necessities—General rule. Where an infant has no guardian or parent to supply him with the necessities of life, the law fixes a liability upon him and his estate for these. The rule is necessary, and is founded upon the salient principle that the infant should be bound for those things absolutely necessary for his existence and reasonable comfort according to his surroundings and the circumstances

¹ Holst v. State, 23 Tex. App. 1.

² Territory v. Duran, 3 N. M. 134, 3 Pac. Rep. 53.

³ Taylor v. State, 22 Tex. App. 529.

⁴ St. Louis, I. M. & S. Ry. Co. v. Warren (Ark.), 48 S. W. Rep. 222. See Sand. & H. Dig. Ark., § 2916.

of his case, on the one hand, and to assure those who may come to his rescue and furnish such necessities that they will have a cause of action therefor which cannot be defeated by a plea of infancy, on the other. This is regarded as for the welfare and best interests of the infant, just as it is deemed necessary to protect him from indiscreet and improvident engagements which might be the ruin of himself and estate.¹ Of course it makes no difference, so far as the liability of the infant for his necessities is concerned, whether he made the purchase individually or through the medium of an agent.² And the necessities for which an infant is liable are not the apparent but the actual, real necessities proper for his use, comfort and support according to his condition in life.³ And when a stranger furnishes an infant necessities, he must see at his peril that they are absolutely required and not merely fanciful or imaginary.⁴ Though an infant is liable for necessities, yet this liability is not governed at all by the amount he may agree to pay, but by what is the actual and reasonable worth of the things purchased.⁵ The legal theory of this liability of the infant is an implied contract binding on the infant for absolute necessities. It cannot be enforced upon an express contract,

¹ Price v. Sanders, 60 Ind. 310; Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. Rep. 176; Tucker v. Moreland, 10 Pet. 58; Stone v. Dennison, 1 Pick. (Mass.) 1; Guthrie v. Morris, 22 Ark. 411; Hyman v. Cain, 3 Jones (N. C.), 111; James v. Gillen, 3 Ind. App. 473, 30 N. E. Rep. 7; Henderson v. Fox, 5 Ind. 489; Shaw v. Bryant, 65 Hun, 57, 19 N. Y. S. 618; M'Minn v. Richmonds, 6 Yerg. (Tenn.) 9; Englebert v. Troxell, 40 Neb. 195, 58 N. W. Rep. 852; 1 Bl. Comm. 466; Bent v. Manning, 10 Vt. 225; Lefils v. Sugg, 15 Ark. 137; Maddox v. Miller, 1 M. & S. 738; Lynch v. Johnson (Mich.), 67 N. W. Rep. 908; House v. Alexander, 105 Ind. 109, 4 N. E. Rep. 891; Genereux v. Sibley, 18 R. I. 43, 25 Atl. Rep. 345; Trainer v. Trumbull, 140 Mass. 527, 6 N. E. Rep. 761; Phillipps v. Lloyd, 18 R. I. 99, 25 Atl. Rep. 909; Ferguson v. Bobo, 54 Miss. 121; Richardson v.

Strong, 13 Ired. (N. C.) 106; Locke v. Smith, 41 N. H. 346; Robinson v. Weeks, 56 Me. 102.

² Fruchey v. Eagleson, 15 Ind. App. 88, 43 N. E. Rep. 146.

³ Price v. Sanders, 60 Ind. 310; Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. Rep. 176.

⁴ Ford v. Fothergill, 1 Esp. 211; Price v. Sanders, 60 Ind. 310; Clowes v. Brooke, 2 Str. 1101; Hands v. Slaney, 8 T. R. 578; Bent v. Manning, 10 Vt. 225; Gregory v. Lee, 64 Conn. 407, 30 Atl. Rep. 53.

⁵ Smith v. Crohn (Tex. Civ. App.), 37 S. W. Rep. 468; Askew v. Williams, 74 Tex. 294, 11 S. W. Rep. 1101; Trainer v. Trumbull, 141 Mass. 527, 6 N. E. Rep. 761; Locke v. Smith, 41 N. H. 346; Barnes v. Barnes, 50 Conn. 572; Earle v. Reed, 10 Metc. (Mass.) 387; Welch v. Olmstead, 90 Mich. 492, 51 N. W. Rep. 541.

for the infant is not, strictly speaking, capable of contracting. In fact the liability is fixed rather by operation of law than by contract.¹ But if the infant has a parent or guardian, he cannot bind either himself or estate even for necessities, unless the parent or guardian culpably fail or refuse to furnish them.² In fact, he could not ordinarily bind his estate when he has a parent who is able to afford him necessities. For then the parent is liable for any supplies which the infant may need when he neglects or improperly refuses to furnish them; and a stranger supplying them can compel the parent to pay therefor. Of course if the parent were insolvent and nothing could be made out of him at law, and the infant could not therefore get credit on the strength of the ability of the parent to pay for his necessities, no doubt he might buy them on his own responsibility and thereby charge his estate therefor.

§ 671. Contract for necessities — Status of.— While an infant is not liable on an express contract made during infancy, as a general rule, yet if he execute a note, bond or other contract for necessities, he will be liable in an action on such obligation to the extent that the same represents supplies necessary for him in his condition in life and surroundings, and are reasonable in price, and no further. While the liability is fixed rather by law than by contract, yet when sued on a contract for necessities, the liability exists by virtue of an implied contract, or an implied legal ability to contract for supplies. At least, being liable in law for the necessities, an action may be maintained on his contract therefor; for this could be done, indeed, were there no express contract by the infant to pay. The fact that he may have made a contract to pay for them, whether by promissory note or otherwise, does not add to or take from the legal liability. The contract, therefore, when for

¹ Hyman v. Cain, 3 Jones (N. C.), Tex. Cr. Rep. 252, 20 S. W. Rep. 578; 111; Gregory v. Lee, 64 Conn. 407, 30 Atl. Rep. 53; Trainer v. Trumbull, 141 Mass. 537, 6 N. E. Rep. 761; Price v. Sanders, 60 Ind. 310; Ayers v. Burns, 87 Ind. 245; Henderson v. Fox, 5 Ind. 489; James v. Gillen, 3 Ind. App. 472, 30 N. E. Rep. 7; Gay v. Bal-
lon, 4 Wend. 403; Jones v. State, 31
Epperson v. Nugent, 57 Miss. 45; Rundell v. Keeler, 7 Watts (Pa.), 237; Cole v. Pennoyer, 14 Ill. 158; Barker v. Hibbard, 54 N. H. 539; Van Valkenberg v. Watson, 13 Johns. 480.
² Guthrie v. Murphy, 4 Watts (Pa.), 80.

proper necessities, and when for necessities and other things, may be enforced and sued upon to the extent that it represents the obligation to pay a reasonable price for the necessities, but no further.¹ As an infant is liable on a promissory note executed for supplies, where the amount of the note does not exceed the fair and reasonable value of the necessities thus furnished, his surety on such a note will also be liable; and if the surety be driven to the necessity of paying the note, he has a right of action against the infant for the amount thus paid.² So, too, a trust deed executed by an infant is valid and can be enforced to the extent that it secures necessities properly furnished.³ If the contract of an infant be such that under the rules of evidence its consideration cannot be inquired into, the infant will not be liable thereon, though it was executed for necessities.⁴ No doubt, however, when this is the case, the person who furnished the supplies might ignore the instrument and sue for the actual value of the necessities as upon implied contract.

§ 672. **Necessaries — Who may determine what are.**—An infant who is living with his parents is presumed to receive support from them such as is proper and in keeping with their ability. In other words, there is a kind of presumption that parents do their legal duty to their children. And an infant living with his parents cannot bind himself nor them to a stranger, even for what might be apparently necessary, because the law does not tolerate interference on the part of strangers to dictate what a parent shall and shall not furnish his child, unless it is further shown, affirmatively, that the parent is culpably negligent in furnishing these.⁵ What articles are properly to be regarded as necessities is usually a question of law for the court, while the question whether the condition and surroundings of the infant demand them is one of fact.⁶

¹ Haines v. Tarrant, 2 Hill (S. C. Law), 400; Earle v. Reed, 10 Meto. (Mass.) 389; Dubose v. Wheddon, 4 McCord (S. C.), 221; Stone v. Dennison, 13 Pick. (Mass.) 1; Guthrie v. Morris, 22 Ark. 411; Cooper v. State, 37 Ark. 421.

² Haines, Adm'r, v. Tarrant, 2 Hill, (S. C. Law), 400.

³ Cooper v. State, 37 Ark. 421.

⁴ Cooper v. State, 37 Ark. 421.

⁵ Bimbridge v. Pickering, 2 W. Bl. 1326; Freeman v. Bridger, 4 Jones (N. C.), 1.

⁶ Merriman v. Cunningham, 11 Cush. (Mass.) 40.

§ 673. Necessaries — Wife of infant — Support.— The estate of an infant being liable for his necessities such as are consistent and proper for his station in life and ability, he is liable therefore for necessities furnished his wife, where he has married before reaching his majority, as necessities for his lawful wife are in law necessities for himself, and stand upon the same basis.¹ This liability continues though the husband and wife live apart by consent, where the wife offers to return to and live with the husband and he refuses to receive her.²

§ 674. Liability of infant for money as a necessity — Remedy of lender.— Where a person in good faith lends money to an infant with which to purchase supplies necessary in his case, and the sum thus loaned is so applied by the infant, there will arise a right of action in equity in favor of the lender to have the property of the infant applied to the payment of the debt;³ but the remedy in equity is exclusive,—there is none at law.⁴ And if a person should lend money to an infant to buy necessities, and the infant should spend the money for something not within the term, there would be no remedy against the infant.⁵ The remedy in chancery in such instances is to have subrogation, upon equitable principles, to the rights of the tradesman, who could have recovered from the infant if the money borrowed had been applied to the purchase of the necessities.⁶ But money loaned to an infant to purchase immunity from military service does not come within the term “necessaries.”⁷

§ 675. Necessaries — What are — Question of fact.— There is no inflexible rule by which to determine what are and are not necessities suitable and appropriate for an infant. What would be legitimate necessities for one would not be for an-

¹ *Turner v. Trisby*, 1 Str. 160; *Cunningham v. Irwin*, 7 S. & R. (Pa.) 247; *Cooper v. State*, 37 Ark. 421.

² *Cunningham v. Irwin*, 7 S. & R. (Pa.) 247.

³ *Randall v. Sweet*, 1 Denio, 460; *Marlow v. Pitfield*, 1 P. Wms. 558, 559; *Kilgore v. Rich*, 83 Me. 305, 23 Atl. Rep. 176.

⁴ *Darby v. Boucher*, 1 Salk. 278;

Earle v. Peale, 1 Salk. 387; *Marlow v. Pitfield*, 1 P. Wms. 558.

⁵ *Probart v. Nouth*, 2 Esp. 473; *Bent v. Manning*, 10 Vt. 225, 230; *Ellis v. Ellis*, 12 Mod. 197; *Earle v. Peale*, 1 Salk. 386; *Randall v. Sweet*, 1 Denio, 460.

⁶ *Bent v. Manning*, 10 Vt. 225.

⁷ *Dorrell v. Hastings*, 28 Ind. 478.

other differently situated. The solution of the question, therefore, becomes one of fact. In arriving at a conclusion it is proper to take into consideration the station, circumstances and general surroundings of the infant, together with any other like questions which might assist in determining what is proper.¹ Lord Ellenborough held in *Coates v. Wilson*,² that regimentals furnished an infant volunteer in the British army were proper necessities, with which he would be chargeable; but his lordship seemed to place stress upon the fact that it was during times of extraordinary peril, and seemed to justify the ruling to a great extent because of this fact.

§ 676. Necessaries — Burden of proof.— Where it is sought to charge an infant with liability for necessities furnished by a stranger, it devolves upon such stranger to affirmatively show every fact which is required to bring the articles furnished the infant within the term “necessaries,” and that it was proper for him to furnish them, as no presumptions will be indulged against an infant to charge him with liability.³

§ 677. Necessaries — Attorney’s services.— The authorities are not entirely in harmony on the question whether the services of an attorney for an infant is within the meaning of the term “necessaries.” It has been held that an infant is not liable to an attorney for services in examining the title to property of the infant in order to ascertain its status.⁴ The supreme court of errors of Connecticut sustained a claim by an attorney against an infant for the value of services rendered in prosecuting an action for damages for seduction where the plaintiff was poor and had the support of a child thrown upon her in her poverty. The court, *inter alia*, said: “We think there may be cases, and the jury have found this to be one of them, where a civil suit may, under extraordinary circumstances, be the only means by which an infant can procure the absolute necessities

¹ Englebert v. Troxell, 46 Neb. 195, 58 N. W. Rep. 852; Cobb v. Buchanan, 48 Neb. 391, 67 N. W. Rep. 176; Maddox v. Miller, 1 M. & S. 738; Bent v. Manning, 10 Vt. 225; Lynch v. Johnson (Mich.), 67 N. W. Rep. 908; Mel-

ton v. Katzenstein (Tex. Civ. App.), 49 S. W. Rep. 173.

² 5 Esp. 152.

³ Wood v. Losey, 50 Mich. 475, 15 N. W. Rep. 557.

⁴ Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. Rep. 176.

which he requires; and, where such is the case, it would be a reproach to the law to deny him the power of making the necessary contracts for its commencement and prosecution."¹ The right to recover for the services of an attorney in a similar case has been sustained in New York.² In Texas the infant has been held liable on his contract for the services of an attorney to defend him against a prosecution for the violation of the laws of the state.³ And in other states a like conclusion has been reached where the services were made to appear to be for the manifest benefit of the infant and were absolutely necessary to protect valuable rights, liberties, etc.⁴ Of course the infant is not bound by any kind of a contract in these cases. The right of the attorney to recover is practically based on an implied legal liability for the reasonable and proper value of the services as necessities. The recovery, no matter what the contract may stipulate, must be limited to this amount.⁵ It is not so much the contract that makes the infant liable as the law. When the contract is in keeping with the amount for which the law would permit a recovery, it can be enforced, as the same amount could be recovered any way. If it is for more than the legal limit, however, the recovery must be had without reference to the contract, and be governed by what is reasonable and proper, under all the circumstances, for the services. Thus circumscribed, it would seem from principle, as well as from authority, that there may be cases in which the services of an attorney become so important to the welfare and interest of the child that an allowance will be made therefor.

§ 678. Necessaries—Expense of improving and protecting property.—It is usually held that material or money with which to buy it for the purpose of improving the real estate belonging to an infant is not within the meaning of the term "necessaries," and that an infant cannot be held liable in law upon an undertaking to purchase the same. He cannot build new structures on his land, though to do so might materially

¹ *Munson v. Washband*, 81 Conn. 303, 308.

² *Petrie v. Williams*, 68 Hun, 583, 23 N. Y. S. 237.

³ *Askey v. Williams*, 74 Tex. 294, 11 S. W. Rep. 1101.

⁴ *Ayers v. Burns*, 87 Ind. 245; *Barker v. Hibbard*, 54 N. H. 589; *Epperson v. Nugent*, 57 Miss. 45.

⁵ *Petrie v. Williams*, 68 Hun, 589, 23 N. Y. S. 237.

enhance it and make it more profitable as property. The inhibition extends to all kinds of repairs and structures, as a general rule.¹ The rule has been carried to the extent of denying the power of an infant to contract for repairs actually necessary to rescue his estate from serious and material injury.² But the infant would ordinarily be liable for money with which to pay lawful taxes on the land.³ Upon principle the safest guide in all cases of doubt is, an infant should be chargeable to a proper value for those things in the nature of repairs and improvements necessary to arrest waste; to keep the property from becoming worthless as a source of revenue; to rescue or protect it from the ravages of floods or other unforeseen injury, and to keep it in such repair and order that it will at least reasonably well serve the purposes for which it is fitted, to the end that the estate may be kept valuable and a continuing income assured.

§ 679. **Necessaries — What are not.**—In discussing the term “necessaries” it will be instructive to give some illustrations of what have been held not to be such. Of course these must be confined within the actual and necessary wants of the infant, leaving out of the question all freaks of fancy or folly which may prompt a wish for almost any conceivable thing. Generally a horse, a stock of goods, or any other property purchased with a view to speculation, cannot be regarded as necessary.⁴ Nor are “horses, saddles, bridles, pistols, whips and fiddles.”⁵ A dwelling-house is not such.⁶ A barber chair and fixtures necessary to the proper operation of a barber shop are not necessities for which an infant may bind himself.⁷ A bicycle is not necessary, though the infant could not go home to dinner

¹ Price v. Sanders, 90 Ind. 310; Horstmeyer v. Connors, 56 Mo. App. 115; Wernock v. Lear (Ky.), 11 S. W. Rep. 438; Tupper v. Cadwell, 12 Metc. (Mass.) 559; Mason v. Wright, 13 Metc. (Mass.) 306; Wallace v. Bardwell, 126 Mass. 366; Bloomer v. Nolan, 36 Neb. 51, 53 N. W. Rep. 1039.

² Tupper v. Cadwell, 12 Metc. (Mass.) 559; Phillips v. Lloyd, 18 R. L. 99, 25 Atl. Rep. 909.

³ Horstmeyer v. Connors, 56 Mo. App. 115.

⁴ House v. Alexander, 105 Ind. 109, 4 N. E. Rep. 891; Mason v. Wright, 13 Metc. (Mass.) 308.

⁵ Price v. Sanders, 60 Ind. 310; Wood v. Losey, 50 Mich. 475, 15 N. W. Rep. 557.

⁶ Allen v. Lardner, 78 Hun, 603, 29 N. Y. S. 213.

⁷ Ryan v. Smith, 165 Mass. 303, 48 N. E. Rep. 109.

from work without it, whereas he could do so if he had one.¹ Medical attention furnished an infant is not chargeable to him as a necessity when afforded by the physician with the intention and expectation that the parent, not the infant, would be looked to for pay, if the parent cannot pay for same.² A wagon or other like thing will not be deemed, ordinarily, a necessity.³ In short, any kind of stock in trade or any property with which an infant means to do business, and bought for this purpose, is not within the term "necessaries." To enable him to contract for those would be absurd when the law withholds from him the ability to contract in general. The very purpose for which they would be bought could not be carried out. Every sale the infant might make, or every contract he might enter into in connection with such property, would be voidable at his option either before or after arriving at the age of majority. He could sell a person an article one day, spend the money at once, and the very next day take it away from him. His customers would be at his mercy. The law would place a sword in his hand, which, wielded with the hand of infancy, would become, or might become, one of injury and oppression. The wisdom of the law, therefore, forbids an infant to contract for any property other than such as is necessary for his support. And goods, wares and merchandise, or other property for the purpose of speculation or sale, are not, therefore, deemed within the term.⁴

§ 680. **Necessaries — Fire insurance.**— Whether or not an infant is liable on a contract of fire insurance, whereby his property is protected from destruction, is a question of some difficulty. It has been held that he is not.⁵ The correctness of this ruling, however, is at least questionable. It would seem that such an expense might in many instances be regarded as necessary for an infant. To leave property unprotected from the dangers and ravages of fire at this modern day is regarded as very poor business judgment. If an infant should insure his

¹ *Pyne v. Wood*, 145 Mass. 558, 14 N. E. Rep. 775.

² *Tharp v. Connelly*, 48 Mo. App. 59.

³ *Paul v. Smith*, 41 Mo. App. 275.

⁴ *McCarthy v. Henderson*, 138 Mass. 310; *Pyne v. Wood*, 145 Mass. 558, 14 N. E. Rep. 775; *Tupper v. Caldwell*, 12

Metc. (Mass.) 559; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Ryan v. Smith*, 165 Mass. 303, 43 N. E. Rep. 109.

⁵ *New Hampshire Fire Ins. Co. v. Noyes*, 32 N. H. 345.

house, and it should then burn, he could collect his insurance, for the company could not repudiate the contract. The contract is voidable at the option of the infant, to be sure, but that could make no difference. If he should have a loss before he arrives at majority, he could sue by his next friend or guardian to collect the damages sustained. It might be the last vestige of property he had, and the fire might leave a comparatively unsalable piece of land on which to pay taxes. The income might be shut off, as the building might have been the inducement for renters. The infant may need the proceeds or income of the property for his education or other necessities of life. He has wisely fortified himself against such a condition of things by contracting for a small sum to insure protection against ruin. The company owes the amount of the policy or loss unless the infant repudiates the contract. He cannot ordinarily repudiate it until majority, and of course he will not then do so. The loss has demonstrated the wisdom of the infant which prompted him to arm himself against possible ruin. Time has revealed that the foreshadowed possibility has been realized. And yet the broad proposition that a premium for fire insurance is not a necessity has been laid down without qualification. Of course the infant could not be made to pay a contract for a premium where it is manifest that an exorbitant price was demanded of him. His liability would be a reasonable price for the hazard undertaken by the company. Protected under the watchful care of this rule the infant is fully favored, and should be held liable for such contract where, in the light of all the circumstances, it would be expedient and in keeping with good business caution to keep his property protected from destruction by fire.

§ 681. Immunity of infants from suit.—As an infant is not capable of binding himself in the ordinary transactions of life, he cannot be made defendant in an action of any kind save, as a general rule, actions by the state for the violation of the criminal laws. This is the necessary and logical result of the protection which the law throws around the infant from liability in general. For, if he could be sued, he would be required to elect whether he would repudiate his obligations before he had arrived at years of maturity, and he might be required

to exercise this discretion almost as soon as the contingent liability might be incurred.¹ So in a case where an adult sought to recover an engagement ring from an infant who had broken her marriage engagement with him, it was held that the action would not lie during the infancy of the defendant.² But the question of the right of an infant to sue, or his liability to suit, cannot be determined unless the age of the party appears in some of the pleadings in the action, as infancy is not presumed; nor can courts be expected to take notice of the ages of parties litigant.³ Infancy is not presumed even where the records of the case show the appointment of a guardian *ad litem*.⁴

§ 682. Immunity of infants from suit — Rule in case of counter-claim.— As a rule an infant cannot be sued on a counter-claim interposed by his adversary in an action brought by the infant, any more than the claim of his opponent could be asserted in a separate suit against the infant. In a case of counter-claim, therefore, no judgment can be rendered against the infant without the appointment of a guardian *ad litem* and full compliance with all other requirements of law touching actions against infants.⁵

§ 683. Actions against adults — Rights and duties of infants.— An infant may sue an adult upon a contract or undertaking of any kind, or for an injury. But when he sues upon a mutual agreement, and by the terms thereof there are duties for the infant to perform as part of the contract, or where he has purchased property and sues to rescind the agreement, he will not be allowed to recover unless he has done equity. That is, for instance, if he should buy a horse and sue to recover back the price paid, he must, if he has the horse, return or offer to return it, as the law will not permit him to keep the fruits of his contract with one hand and recover back with the other the price he paid for it. For this would be turning the shield of infancy into a dangerous sword, as an infant, by

¹ *Stromberg v. Rubenstein*, 19 Misc. Rep. 647, 44 N. Y. S. 405; *Bouche v. Ryan*, 3 Blackf. (Ind.) 472; *Miller v. State*, 110 Ala. 69, 20 S. Rep. 392.

² *Stromberg v. Rubenstein*, 19 Misc. Rep. 647, 44 N. Y. S. 405.

³ *Edwards v. Beall*, 75 Ind. 401; *Hodges v. Frazier*, 31 Ark. 58.

⁴ *Hodges v. Frazier*, 31 Ark. 58.

⁵ *Morris v. Edmonds*, 43 Ark. 427; *Radley v. Kenedy*, 14 N. Y. S. 268.

inducing another to sell him property, could at once demand back the purchase price and still hold the property. Such a principle is odious in the eye of the law.¹ And, of course, the mere fact that the infant may sue an adult does not authorize one *sui juris* to sue an infant even by the indirect means of a claim in set-off, counter-claim or recoupment. That is, this is the rule, unless the infant could be required to respond to the cross-action if it were brought separately.² This would depend to some extent upon the kind of action. For, as an infant is liable for his tort, if the injury should arise out of the cause of action sued on by the infant, the damages suffered by the adult might be recovered in recoupment. If, however, the damages which he might attempt to set off or recoup against the claim of the infant should arise out of contract, the recoupment could not be allowed, for the infant is not liable for damages arising out of contract. If it be attempted to set off one contract against another this could not be done, unless the two causes of action be so intimately blended and connected that the infant would have no right to insist on his claim without allowing that of the other. And in no case can a recoupment or set-off be allowed to be pleaded against an infant unless, at the time of such plea, the infant is capable of being sued, and he cannot be sued during minority, as a general rule.

§ 684. Suits by infants — Rights of infant upon arriving at age pending the action.— An infant who has sued by next friend may, upon arriving at full age before the trial, be permitted to prosecute the suit thereafter in his own name and right.³ The name of the next friend may then be dropped or stricken from the pleadings and that of the adult child substituted.⁴ The fact that a person is an infant when an action is begun against him will not give him the rights of an infant as to the judgment recovered where he comes of age in ample time to make any defense he might, where he knew of the action fully, was properly made a party and neglected to make any defense; at least it is so held in Kentucky.⁵ So, where a

¹ Biederman v. O'Connor, 117 Ill. 493, 7 N. E. Rep. 463.

² Widrig v. Taggart, 51 Mich. 103, 16 N. W. Rep. 251.

³ Sibley v. Ratcliffe, 48 Ark. 477, 8 S. W. Rep. 686.

⁴ Lassiter v. Sampson, 78 Ga. 61, 3 S. E. Rep. 243; Sims v. Renwick, 25

Ga. 58.

⁵ Coffy v. Proctor Coal Co. (Ky.), 20

next friend or guardian *ad litem* seeks to vacate a judgment against an infant, and, pending the trial, the infant attains his majority, he may repudiate the acts of his guardian *ad litem* and consent that the judgment stand.¹ If the guardian *ad litem* has been regularly appointed and has performed his duties as such in the manner required by law, and all other provisions of the law regulating actions against infants have been complied with before the infant attains his majority, the fact that he may become *sui juris* after the service on him, as an infant, of process before the rendition of judgment, will not render the judgment invalid for the want of service, as jurisdiction is obtained fully before the infant arrived at age, and this jurisdiction, having attached, could not be ousted by the mere arriving at majority of one of the parties.² Where, however, the infant arrives at full age after an action against him is begun, he will not be bound by the judgment where he has not been served with process after becoming *sui juris*, though a guardian *ad litem* was appointed, where the latter declined or failed to perform all things required of him by law in order to give jurisdiction over the infant.³ When an action upon a contract, executed by an infant, is begun during his minority, the plea of infancy cannot be defeated by showing that the same was ratified after the infant became *sui juris*, as the right to recover is governed by the status of the parties at the time the action is instituted, not when it is terminated in judgment.⁴

§ 685. **Right of infants to sue for personal injury.**—Generally, where an infant receives a personal injury at the hands of another, he has a right of action for the tort, and may recover such damages as naturally, necessarily and reasonably flow from the wrong.⁵ He may sue for same by next friend before arriving at full age to the extent that the action does not conflict with the right of the parents to recover for loss of services and medical and nursing expenses.⁶ But in such an

¹ *Dow v. Dow*, 66 Hun, 631, 21 N. Y. S. 487.

² *Deering v. Hurt* (Tex.), 2 S. W. Rep. 42.

³ *Welch v. Agar*, 84 Ga. 583, 11 S. E. Rep. 149.

⁴ *Freeman v. Nichols*, 138 Mass. 313.

⁵ *Clark Mile-End Spool Co. v. Schaffery*, 58 N. J. Law, 229, 33 Atl. Rep. 284; *Ft. Worth St. Ry. Co. v. Witten*, 74 Tex. 202, 11 S. W. Rep. 1091.

⁶ *Texas & P. Ry. Co. v. Malone* (Tex. Civ. App.), 38 S. W. Rep. 538; *Dublin Cotton Oil Co. v. Jarrard* (Tex. Civ.

action the infant has no right to recover for the loss of wages during minority, unless it be shown that he has been duly emancipated by his natural parents or those having the legal right to his domestic services during infancy.¹ To the extent that the infant may recover, however, the right is personal to him, and the father cannot waive it so as to preclude the right of action in favor of the infant.² If the infant have a statutory guardian, this representative may usually sue in the name of his ward to enforce any ordinary legal rights.³ In fact, the action must not be brought in the name of the next friend, but rather in the name of the infant by his next friend, as the next friend is not the real party in interest, but only the representative of the real party — the infant.⁴ But if the situation of the next friend, guardian or other representative suing in right of the infant be such that he cannot perform his duty to his infant, ward or client without conflicting with self-interest or other duties, the infant should sue by some representative whose duties and interests would not conflict with his rights, and the law permits this.⁵

§ 686. **Marriage of infants — Effect on right to sue.**— The marriage of an infant will ordinarily absolve him from all filial duty of a domestic nature thereafter, but this does not make him of age nor enable him to sue to dissolve the marriage or for any other purpose. Such an action must be brought by another for him under whatever formalities may be required by statute governing local practice in such cases. He has no capacity to sue in his own name.⁶ And it is the duty of the

App.), 40 S. W. Rep. 581; *Missouri, K. & T. Ry. Co. v. Tonahill* (Tex. Civ. App.), 41 S. W. Rep. 874; *McDoddrell v. Pardee & Curtin Lumber Co.*, 40 W. Va. 564, 21 S. E. Rep. 878; *Wallace v. Jones*, 93 Ga. 419, 21 S. E. Rep. 89; *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. Rep. 726; *Wilson v. Galey*, 103 Ind. 257, 2 N. E. Rep. 736.

¹ *Clark Mile-End Spool Co. v. Schaffery*, 58 N. J. Law, 229, 83 Atl. Rep. 284; *Texas & P. Ry. Co. v. Morin*, 66 Tex. 220, 18 S. W. Rep. 275; *Sawyer v. Sauer*, 10 Kan. 519; *Railway Co. v. Miller*, 51 Tex. 275.

² *Kimbell v. Miller*, 54 Ill. App. 665.

³ *Roberts v. Maddox*, 5 Ark. 189; *Roberts v. Maddox*, 5 Ark. 51.

⁴ *Guild v. Cranston*, 8 Cush. (Mass.) 506; *Morgan v. Potter*, 157 U. S. 195, 15 Sup. Ct. Rep. 590. And see *Kees v. Maxim*, 99 Mich. 498, 58 N. W. Rep. 473.

⁵ *Melay v. Lipp* (Tex. Civ. App.), 40 S. W. Rep. 824. And see *Shiner v. Shiner* (Tex. Civ. App.), 40 S. W. Rep. 449.

⁶ *Wood v. Wood*, 1 Paige Ch. 108; *Wood v. Wood*, 2 Paige Ch. 454.

court to see that a guardian *ad litem* is properly appointed to defend for a married infant.¹ And it is always the duty of a guardian *ad litem* to signify his acceptance of appointment by filing or adopting a proper answer for the infant whom he represents.² If the infant defendant be a married woman, it is customary to appoint her husband as guardian *ad litem*, if he be himself *sui juris*, especially if he is a defendant with her.³

§ 687. **Want of capacity to sue—Demurrer.**—The question of the capacity of an infant to sue cannot be raised by general demurrer where, by statute, as is frequently the case, the want of legal capacity to sue is a distinct and separate ground of demurrer. And this is true, though by the pleadings it appears that the party is an infant, and no guardian or next friend appears in his behalf.⁴ The defect should be met by a special demurrer for this cause, or by answer showing the want of capacity to sue, or by any special plea warranted by the local rules of pleading and practice.

§ 688. **Action by next friend.**—When an infant sues by next friend, as he may usually do, it is not absolutely necessary that he himself verify the pleadings as required by law, but this may as well be done by the next friend representing the infant.⁵ If the infant should be a member of a firm and the action be founded upon an obligation due the partnership, he must still sue by next friend.⁶ Where the father sues as next friend without alleging that the infant has no guardian to maintain the suit, this is but an irregularity and cannot be taken advantage of after verdict.⁷ And if the infant erroneously brings suit in his own name, instead of by next friend, he may be permitted to amend by joining his next friend in his

¹ *Alexander v. Davis*, 42 W. Va. Rep. 549. And see *Parkins v. Alexander* (Iowa), 74 N. W. Rep. 769.
² *Alexander v. Davis*, 42 W. Va. Rep. 549. And see *Parkins v. Alexander* (Iowa), 74 N. W. Rep. 769.
³ *Coleman v. Northcote*, 2 Hare, 148; *Morris v. Edmonds*, 43 Ark. 427.

² *Alexander v. Davis*, 42 W. Va. Rep. 549. And see *Parkins v. Alexander* (Iowa), 74 N. W. Rep. 769.

³ *Coleman v. Northcote*, 2 Hare, 148; *Alexander v. Davis*, 42 W. Va. Rep. 549. And see *Parkins v. Alexander* (Iowa), 74 N. W. Rep. 769.

⁴ *Smith v. Smith* (S. C.), 29 S. E.

⁵ *Reed v. Ryburn*, 23 Ark. 47; *McDuffee v. Boston & M. R. R. Co.*, 82 Fed. Rep. 865.

⁶ *Osborn v. Farr*, 42 Mich. 134, 3 N. W. Rep. 299.

⁷ *Gulf, C. & S. F. Ry. Co. v. Reagan* (Tex. Civ. App.), 34 S. W. Rep. 796; *Hicks v. Beam*, 112 N. C. 642, 17 N. E. Rep. 490.

representative capacity.¹ Not only may an infant sue by next friend, but he may thus sue through all the courts.² And it is not necessary that the same person represent the infant in all the courts. If, for any reason, it becomes proper or necessary to change the next friend, a second may be substituted for the first, who will succeed to all the authority that might have been thereafter exercised by his predecessor.³ The fact that an infant has been emancipated by his parents does not obviate the necessity of suing by next friend. He is still an infant so far as his ability to assert rights in the courts is concerned.⁴ That the next friend sues for the benefit of the infant, instead of in the name of the infant, as next friend, is a mere irregularity and harmless where the record clearly shows that the infant, not the next friend, is the real party in interest.⁵ And the fact that the next friend sues in his own name as the next friend of the infant, instead of in the name of the infant by himself as next friend, is but an irregularity. The necessary amendment may be made before verdict if complained of, and if not, it will be deemed waived.⁶ But a parent cannot bring an action in his own name and right and then amend so as to sue as next friend and in right of his child, for the two capacities are entirely distinct and separate as well as inconsistent.⁷

§ 689. Actions by infants — Who may be next friend.— If the statute should prescribe any regular mode of determining or appointing the next friend, this requirement will have to be complied with. Sometimes the court is authorized to make the appointment with certain discretionary powers. Sometimes the infant, if at age of discretion, may appoint his own representative. And usually the acts and doings of the next friend are under the supervision of the court, and for good cause the

¹ Hicks v. Beam, 112 N. C. 642, 17 S. E. Rep. 490; Branch v. Houston, Busb. (N. C.) 85; Clark v. Cameron, 4 Ired. (N. C.) 161; Hoskins v. White, 13 Mont. 70, 32 Pac. Rep. 163.

² Ames v. Ames, 148 Ill. 321, 36 N. E. Rep. 110.

³ Ames v. Ames, 148 Ill. 321, 36 N. E. Rep. 110.

⁴ Hoskins v. White, 13 Mont. 70, 32 Pac. Rep. 163.

⁵ Gulf, C. & S. F. Ry. Co. v. Styron, 66 Tex. 421, 1 S. W. Rep. 161.

⁶ Wilson v. Me-Ne-Chas, 40 Kan. 648, 20 Pac. Rep. 468; Sick v. Michigan Aid Ass'n, 49 Mich. 50, 12 N. W. Rep. 905. See Albert v. State, 66 Md. 825, 7 Atl. Rep. 697.

⁷ Ash v. Mathes, 52 Mich. 615, 18 N. W. Rep. 384.

court may ordinarily remove him and appoint another. In making this selection it is proper to look to the interests of the infant. With this view in mind, the father, or, in the event of his death, the mother or statutory guardian, will be usually designated and preferred in order.¹

§ 690. Actions by — Authority of next friend.—The next friend suing in right of an infant may ordinarily take any step in the proceeding which will not be to the prejudice of the infant. He may make the required affidavit in an action of replevin for the infant. Such act is in law that of the infant, in whose right and on behalf of whom the next friend proceeds.² Whether a next friend has authority to receive the proceeds of a judgment which he has recovered in right of the infant and give a binding acquittance therefor does not seem very clear from the authorities. The power to legally do so was doubted in a recent case in Maine.³ The learned court of last resort in this state intimate that no such authority exists in the next friend. Of course if this were authorized by statute there could be little doubt of the existence of the right; but in the absence of such local law, the better plan, under the common law, would seem to be, upon principle, for the judgment to be paid to the legal guardian of the infant. It is true that the father is the natural guardian of his infant child, and has a limited control over the property of the minor; but should a judgment which should have been recovered by the father as next friend suing for the child be paid to him instead of a statutory or legal guardian of the estate of the child, and the same should be misappropriated so the child would not get the benefit of it, it is at least doubtful that such a settlement would preclude a legal guardian, who has entered into bond to account to the infant for all that is due him, and by reason of which the infant is protected from any imposition, misconduct or misappropriation, from enforcing the judgment, or prevent the infant from doing so himself upon arriving at full age. In

¹ *Rue v. Meirs*, 43 N. J. Eq. 377, 12 Atl. Rep. 369; *Bernard v. Merrill* (Me.), 40 Atl. Rep. 136.

² *Wilson v. Me-Ne-Chas*, 40 Kan. 648, 20 Pac. Rep. 468.

³ *Bernard v. Merrill* (Me.), 40 Atl. Rep. 136. And see *Gulf, C. & S. F. Ry. Co. v. Younger* (Tex. Civ. App.), 45 S. W. Rep. 1030.

the progress of a cause the parent or next friend can do no act and make no concession or admission that will affect the interest of the child.¹ He cannot receive a sum of money in furtherance of a settlement or compromise of a claim in favor of the infant, though suing for him as next friend. And as he may not receive satisfaction of the claim before judgment, it seems that no other than a regularly constituted guardian should be permitted to bind the infant in receiving satisfaction and payment of a judgment, though the action was commenced and prosecuted to judgment by a next friend in the name and acting in the right of the minor.

§ 691. Action in name of infant — Effect.— An infant cannot sue in his own name. He has not the legal capacity to sue, and his effort to do so will be an irregularity. The action must be brought, generally, by a guardian, natural or statutory, or by next friend, as the local law may require. But such a procedure without representation is not fatal, but only ground for plea in abatement, not in bar of the right to sue.² And further, as the plea raising the question of infancy does not go to the jurisdiction of the subject-matter, if indeed it does to the person of the infant litigant, a guardian *ad litem* or next friend may be appointed by the court or selected by the infant with the sanction of the court, and the pleadings properly amended accordingly after the trial has begun and at any time before verdict.³ If a judgment should be rendered in favor of an infant in his individual capacity, it should be reformed to recite that the recovery was by the next friend for the infant plaintiff.

¹ Burt v. McBain, 29 Mich. 260.

² Schermerhorn v. Jenkins, 7 Johns. 373; Kid v. Mitchell, 1 Nott & McC. (S. C.) 334; Sims v. New York College, 35 Hun, 344; Webber v. Ward, 94 Wis. 605, 69 N. W. Rep. 349; Levynstein v. O'Brien, 106 Ala. 352; Milne v. Van Buskirk, 9 Iowa, 558; Joyce v. McAvoy, 31 Cal. 273; Drake v. Hanshaw, 47 Iowa, 291; Hicks v. Bean, 112 N. C. 142, 17 S. E. Rep. 490.

³ Foley v. California Horse Shoe Co., 115 Cal. 184, 47 Pac. Rep. 42; Hepp v. Huffner, 61 Wis. 150, 20 N. W. Rep.

923; Sabine v. Fisher, 37 Wis. 376; Young v. Young, 3 N. H. 345; Wheeler v. Smith, 18 Wis. 682; Blood v. Harrington, 8 Pick. (Mass.) 552; In re Sanbron's Estate (Mich.), 67 N. W. Rep. 128; Calvin v. Hauenstein, 110 Mo. 575, 19 S. W. Rep. 948; Van Pelt v. Chattanooga, R. & C. Ry. Co., 89 Ga. 706, 15 S. E. Rep. 622; Rima v. Rossie Iron Works, 47 Hun, 153; Rima v. Rossie Iron Works, 120 N. Y. 438, 24 N. E. Rep. 940. See Charleston & Southside Bridge Co. v. Comstock, 86 W. Va. 263, 15 S. E. Rep. 69.

iff, when this is the case;¹ for the infant is only entitled to a judgment in any case by virtue of the representation the law allows him through his guardian or next friend.

§ 692. Right of infants to sue after attaining majority on causes of action accruing during infancy.—In most or all of the states an infant is allowed a certain period of time, usually from one to three years, within which to bring an action to enforce a right accruing during infancy.² But while this privilege is given the infant, it does not follow that he must wait until he arrives at majority in order to assert his right to sue. Having the right by the local law to sue by next friend or other representative, he may proceed to enforce his rights without waiting until he has attained his majority.³ But when he attains his majority, the infant and not his guardian is the proper party to sue on any cause of action which the infant would have a right to assert.⁴

§ 693. Judgment in favor of infants—To whom should be paid.—A judgment recovered by an infant suing by next friend or guardian cannot be satisfied by a payment thereof to the parent as the natural guardian of the infant, for the guardian by nature has no absolute right of control over the property or property rights of his child.⁵ And perhaps the guardian *ad litem*, who is but a temporary representative of the infant, and who is generally under no bond to faithfully discharge his duties in the matter of receiving and accounting for property belonging to the infant, has no more right than the natural guardian, who would have a lively interest in protecting and caring for the property of his child.⁶ It would seem, therefore, that the payment should be made to the statutory guardian.⁷

¹ Texas Cent. Ry. Co. v. Stewart, 1 Tex. Civ. App. 642, 20 S. W. Rep. 962.

² Rev. St. Ind. 1894, § 297; Sand. & H. Dig. Ark., 1894, § 4815; Winer v. Mast, 146 Ind. 177, 45 N. E. Rep. 66.

³ Edwards v. Beall, 75 Ind. 401, 408; Winer v. Mast, 146 Ind. 177, 45 N. E. Rep. 66; Bloomington v. Chittenden, 75 Mich. 305, 42 N. W. Rep. 166. And see Tucker v. Whittlesey, 74 Wis. 74, 42 N. W. Rep. 101.

⁴ Smith v. Smithson, 48 Ark. 261, 3 S. W. Rep. 49.

⁵ Miles v. Kaigler, 10 Yerg. (Tenn.) 10.

⁶ Miles v. Kaigler, 10 Yerg. (Tenn.) 10.

⁷ Miles v. Kaigler, 10 Yerg. (Tenn.) 10; Gulf, C. & S. F. Ry. Co. v. Younger (Tex. Civ. App.), 45 S. W. Rep. 1030; Galveston City R. Co. v. Hewitt, 67 Tex. 473, 8 S. W. Rep. 705; Galveston

If there should be no general guardian of the infant nor curator of his estate, the judgment should be paid into court until one is regularly appointed or the infant arrives at age.¹ And as the next friend is not really a party to the action, the judgment should be recorded in favor of the infant.²

§ 694. Infants — Actions against.— While an infant cannot generally be sued as an adult may, yet there are even civil cases in which he may be made a defendant. Many instances of rights in real property require actions wherein must be determined the rights of infants. Proceedings in partition and other actions relative to the real-estate interest of infants furnish examples. The rights of infant heirs must often be adjudicated, and to do this they must be made parties and become litigants. Actions for purposes of this nature are usually provided for by statute, and the proceeding incident thereto is thus pointed out and defined. At common law an infant cannot be sued unless he have either a statutory guardian or one is appointed by the court in which the action is pending to defend for him. He cannot make a defense alone which would bind him.³ When infants are brought into court by order, as intervenors, to the end that all rights may be precluded in one action, they are entitled to the appointment of, and a representation by, a guardian *ad litem*, as well as service of process, just as though they were formally made defendants in the first instance.⁴ The statutes of the various states usually provide for the appointment of a guardian *ad litem* for an infant when he has no statutory guardian to represent him. The mode of service of process is also generally laid down. This requirement must always be faithfully carried out whether the infant be a resident or non-resident, and a failure to comply with same will render a judgment void for want of jurisdiction.⁵ But if an adult should

Oil Co. v. Thompson, 76 Tex. 235, 13 S. W. Rep. 60.

¹ Galveston City R. Co. v. Hewitt, 67 Tex. 473, 3 S. W. Rep. 705.

² Galveston Oil Co. v. Thompson, 76 Tex. 235, 13 S. W. Rep. 60.

³ 1 Bl. Comm. 464; Carrington v. Brents, 1 McLean, 167; Kromer v. Friday, 10 Wash. 621, 39 Pac. Rep. 229; Allbright v. Flowers, 52 Miss.

246; Hocker v. Montague's Adm'r (Ky.), 29 S. W. Rep. 874; Jewell v. Kirk (Ky.), 47 S. W. Rep. 766.

⁴ Sconfield v. Turner (Tex.), 6 S. W. Rep. 628.

⁵ Rowland v. Jones, 62 Ala. 322; Woods v. Monteville C. & T. Co., 107 Ala. 364, 18 S. Rep. 108. And see, too, Rodgers v. Rodgers' Adm'r (Ky.), 31 S. W. Rep. 139.

erroneously have a guardian *ad litem* to defend for him, he should at once renounce the authority of such representative to act for him. If he stands by and permits such a guardian to file an answer in his behalf without objection, he will be deemed to have adopted the answer thus filed for him.¹ A non-resident infant cannot be represented by an attorney *ad litem* as an adult non-resident might, but there must be a guardian *ad litem* for such infant, service in manner required by the local law, and defense by the representative in right of the infant, before a judgment will be authorized against him beyond the state in which the proceedings are had.² The appointment of the guardian *ad litem* does not obviate the necessity for the publication of a warning order for the non-resident infant;³ nor personal service upon the infant himself, if he be within the jurisdiction of the court.⁴ In suits against infants, statutes usually require that summons be served upon the infant and custodian. It has been held under such a statute that the service of a summons on the infant in the presence of his custodian and the person authorized by law to represent him in the litigation will be tantamount to service upon both.⁵

§ 695. Infants — How served with summons.— The service of a summons upon an infant alone, and a return accordingly, will not be sufficient to get him into court. He must be served in person and by his guardian *ad litem*. The service must be made on both, just as though there were two defendants, and the return must show accordingly; that is, it must show service on the infant and on the guardian *ad litem*, guardian by nature or other proper representative as such. Such requirements are usually made by statute.⁶ Until service is thus had

¹ *Mason v. Duncason*, 166 U. S. 533, 17 Sup. Ct. Rep. 647.

² *Williams v. Ewing*, 31 Ark. 229; *Hodges v. Frazier*, 31 Ark. 58; *Bonner v. Little*, 38 Ark. 397.

³ *Hodges v. Frazier*, 31 Ark. 58.

⁴ *Pinchback v. Graves*, 42 Ark. 222; *Pillow v. Sentelle*, 39 Ark. 61; *Evans v. Davis*, 39 Ark. 235; *Wells v. Smith*, 44 Miss. 296.

⁵ *Hendrickson v. Canter* (Ky.), 49 S. W. Rep. 188.

⁶ *Hall v. Denckla*, 28 Ark. 506; *Estes v. Bridgforth* (Ala.), 21 S. Rep. 512; *Freeman v. Russell*, 40 Ark. 56; *Wells v. American Land Mtg. Co.*, 109 Ala. 480, 20 S. Rep. 136; *Fanning v. Foley*, 99 Cal. 336, 33 Pac. Rep. 1098; *McIntosh v. Atkinson*, 63 Ala. 241; *Cook v. Rogers*, 64 Ala. 406; *Carter v. Ingram*, 43 Ala. 78; *Gayle v. Johnston*, 80 Ala. 395; *Herring v. Rickets* (Ala.), 13 S. Rep. 502.

a statutory or special guardian has no right or authority to enter an appearance in the action against the infant.¹ The defect may be urged for the first time on appeal, as infants are not bound by irregularities of practice or procedure.²

§ 696. Judgments—Right of infants to vacate.—When a judgment has been rendered against an infant on an ordinary contract, or for anything not expressly authorized by statute, the infant is always given a reasonable time after he attains his majority within which to appeal from same or otherwise proceed to vacate or set it aside.³ Generally, however, a judgment against an infant will not be set aside on the ground of infancy alone, where no injury has been done. So, where infants joined in an action to set aside a will, and the relief asked was granted, the land mentioned in the instrument was ordered sold, at the sale the infants-purchased the amount which would equal their respective shares in the estate under the will, but paid no actual consideration therefor, they will not be heard to ask a vacation of such judgment and a setting aside of the sale thereunder, as the property they bought was just what they were entitled to and would have received had the judgment been binding.⁴ Of course it makes no difference, so far as the right of an infant to vacate a judgment is concerned, that the proceedings sought to be annulled do not show that the infant was under age. His right in this respect depends upon his age, not the recitals or absence of recitals in the judgment.⁵ And while a judgment which may have been irregularly rendered against an infant without the appointment of a guardian *ad litem*, or the appearance by some one on behalf of the infant

¹ *Haley v. Taylor*, 39 Ark. 104; *Gibson v. Chouteau's Heirs*, 39 Mo. 536, 565; *Irwin v. Irwin*, 57 Ala. 614; *Bondurant v. Sibley's Heirs*, 37 Ala. 565; *Herring v. Rickets* (Ala.), 13 S. Rep. 502.

² *Frost v. Frost*, 15 Misc. Rep. 167, 37 N. Y. S. 18. And see *Walker v. Redding* (Fla.), 23 S. Rep. 565.

³ *Grimes v. Grimes*, 143 Ill. 550, 32 N. E. Rep. 847; *Haines v. Hewitt*, 129 Ill. 347, 21 N. E. Rep. 930; *Lloyd v. Kirkwood*, 112 Ill. 329; *Hess v. Voss*, 52 Ill. 472; *Coffin v. Argo*, 134 Ill.

276, 24 N. E. Rep. 1068; *Wichita Land & Cattle Co. v. Ward*, 1 Tex. Civ. App. 307, 21 S. W. Rep. 128; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. Rep. 262.

⁴ *Cox v. Lynn*, 138 Ill. 195, 29 N. E. Rep. 857. And see *Abernathy v. Ross* (Ky.), 20 S. W. Rep. 222; *Franklin Savings Bank v. Taylor*, 53 Fed. Rep. 854, 9 U. S. App. 406, 4 C. C. A. 55; *Payne v. Mosek*, 114 Mo. 63, 21 S. W. Rep. 751.

⁵ *Grimes v. Grimes*, 143 Ill. 550, 32 N. E. Rep. 847.

duly authorized to act for him, may, for such error and irregularity, be reversed on appeal, relief may also be had by application to the court in which the judgment is rendered, even at a subsequent term, if the application is made within a time reasonable under all the facts and circumstances of the case.¹

§ 697. Presumption of infancy.— In all actions, whether on contract or otherwise, and in all adjudications and proceedings of any kind, the presumption that the parties therein interested are adults and capable of suing and being sued is indulged. And unless the fact of infancy be made to appear, the courts will always proceed to judgment as though no infant were concerned.² Were the rule otherwise, every litigant would be compelled to allege and prove himself as well as the defendant to be *sui juris* before he could prosecute any kind of an action.

§ 698. Notice to take depositions — Upon whom must be served in case of infant parties.— Depositions or other evidence requiring notice to the adverse party cannot be read in evidence in an action in which an infant is concerned unless the notice has been served not only on the infant, but on his guardian *ad litem*, next friend, or other representative conducting the litigation in right of the infant. In other words, the notice to take testimony must be served on the infant and his representatives just as a summons in the cause is required to be served. Usually it should be served on both the nominal and real party — the infant and his next friend or guardian *ad litem*, service on either without the other not being sufficient.³

§ 699. Disabilities of infants — Who may take advantage of — Death of infant.— As a general rule, so long as the infant lives, he has the right to assert the disabilities of infancy personally. No one has a right to require him to accept this protection on the one hand nor repudiate it on the other. Unless, therefore, he dies, he has the right to wait until he arrives at

¹ York Draper Mercantile Co. v. Hutchinson, 2 Kan. App. 47, 43 Pac. Rep. 315; Neenan v. St. Joseph, 26 Mo. 89, 28 S. W. Rep. 963.

² Foltz v. Wert, 103 Ind. 404, 2 N. E. Rep. 950.

³ Strayer v. Long, 83 Va. 715, 3 S. E. Rep. 372; Walker v. Grayson, 86 Va. 337, 10 S. E. Rep. 51.

majority to decide whether he will ratify or disaffirm any contract made during the disability of infancy. Should he die before attaining this age, the right to plead his infancy would vest in his privies—his legal representatives, executors, administrators, etc. No others could either assert or deny the privilege.¹

§ 700. Disability must be pleaded.—The disability of infancy is one which the party in interest is not compelled to insist on. The privilege is personal and may be waived if it be desired. And when an adult is sued upon a cause of action which is voidable because of infancy, the plea must be set up, else the right to insist on it will be waived.² If, however, in the course of the trial, infancy is affirmatively proven without objection, the pleadings may be regarded as amended to conform to the proof, which will be as effective as though the disability had been formally set up in the pleadings.³ A litigant is not entitled to require his opponent to sue by next friend instead of in his own name and right, where there is nothing in the pleadings to apprise the court of the fact of infancy, and no showing is made to this effect other than a mere suggestion.⁴

§ 701. Plea of infancy — Effect.—The plea of an infant that, by virtue of his infancy, he is not liable on a contract or

¹Jefford v. Ringgold, 6 Ala. 544; Holt v. Ward, 2 Str. 937; Brown v. Caldwell, 10 S. & R. (Pa.) 114; Smith v. Bowen, 1 Mod. 25; Warwick v. Bruce, 2 M. & S. (K. B.) 205; 2 Kent, Comm. 237, 238; Keene v. Boycott, 2 H. Bl. 511; Roberts v. Wiggin, 1 N. H. 73; Jackson v. Todd, 6 Johns. 257; Van Bramer v. Cooper, 2 Johns. 279; Hoyle v. Stowe, 2 Dev. & Bat. (N. C.) 323; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236; Austin v. Charlestown, 8 Metc. (Mass.) 196; 1 Bl. Comm. 466; Voorhees v. Wait, 3 Green (N. J. Law), 343; Bozeman v. Browning, 31 Ark. 264; Hill v. Taylor, 125 Mo. 331, 28 S. W. Rep. 599; Walton v. Gaines, 94 Tenn. 420, 29 S. W. Rep. 458; Chambers v. Ker, 6 Tex. Civ. App. 373, 24 S. W. Rep. 1118; Hooper v. Payne, 94 Ala. 223, 10 S. Rep. 431; Baldwin v. Rosier, 58 Fed. Rep. 810; Fry v. Leslie, 87 Va. 269, 12 S. E. Rep. 671; Mansfield v. Gordon, 144 Mass. 168, 10 N. E. Rep. 773; Harris v. Ross, 112 Ind. 314, 13 N. E. Rep. 873; Jones v. Butler, 30 Barb. 641; Hastings v. Dollarhide, 24 Cal. 195; Beardsley v. Hotchkiss, 96 N. Y. 201; Kendall v. Lawrence, 22 Pick. (Mass.) 540.

²Blake v. Douglass, 27 Ind. 416; Cohee v. Baer (Ind.), 32 N. E. Rep. 920.

³Forrestell v. Wood (Md.), 23 Atl. Rep. 133.

⁴Prince v. Towns, 83 Fed. Rep. 161.

other liability, is in effect a repudiation of the contract or undertaking.¹ This being true, when an infant has received property by virtue of a contract with another, and upon arriving at full age is sued for the price, upon a plea of infancy in bar of the action the title to the property becomes at once vested in the vendor as between the parties, and he may recover same by appropriate remedy from the infant, if he still has it.²

§ 702. Disabilities of infancy—Defense—Burden of proof. In order that an action upon a contract against an infant be maintained after he becomes of age, it is not necessary that the plaintiff allege that, at the time of the transaction upon which the action is grounded, the defendant was a minor. This being a matter of defense must be pleaded, and the *onus* rests on the defendant to both plead and prove the fact of infancy before the action, upon this ground, can be defeated.³ And if the plaintiff should prove a ratification by the infant at any time after the contract was made, this will be sufficient proof of a ratification, unless the infant should show by affirmative proof that at the time of such ratification he was still a minor.⁴

§ 703. Removal of disabilities of infants — General effect. When the disabilities of an infant have been removed in accordance with statutory provisions authorizing it, the infant is thus enabled and empowered to sue and be sued as other persons who are *sui juris*, and the statute of limitations begins to run against an infant from the instant the disability to sue is removed.⁵ An infant whose disabilities of minority are thus removed becomes invested with all the capacities and authority in reference to his property rights of every kind as fully and completely as if he had attained full age.⁶ Thus emanci-

¹ Henry v. Rott, 33 N. Y. 526; Brantley v. Wolf, 60 Miss. 420; Badger v. Phinney, 15 Mass. 359; Evans v. Morgan, 69 Miss. 328, 12 S. Rep. 270.

² Evans v. Morgan, 69 Miss. 328, 12 S. Rep. 270.

³ Bay v. Gunn, 1 Denio. 108; Bigelow v. Grannis, 4 Hill (N. Y.), 206; Adam Roth Gro. Co. v. Hopkins (Ky.), 29 S. W. Rep. 293; Rogers v. De Barlahen, 97 Ala. 154, 12 S. Rep. 81;

Hartley v. Wharton, 11 Ad. & E. 934; 2 Greenl. Ev., § 362.

⁴ Bay v. Gunn, 1 Denio, 108; Borthwick v. Caruthers, 1 T. R. 648; Bigelow v. Grannis, 4 Hill (N. Y.), 206.

⁵ Proctor v. Herbert, 36 La. Ann. 250; Merriman v. Sarlo, 63 Ark. 131, 37 S. W. Rep. 879.

⁶ Wilson v. Craighead, 6 Rob. (La.) 429; Harmon v. McCawley, 9 La. (O. S.) 570.

pated, he may ratify and confirm any contract previously made which would be voidable on account of his infancy.¹ He may then be sued as an adult, and a default judgment rendered against him will be effective when he has been regularly served with process and he will be precluded thereby.² And he may be appointed an administrator.³ But the removal of the disability of infancy under these statutes does not authorize one to be admitted to the bar when, in order to be thus admitted, it is required by statute that the person be twenty-one years of age.⁴ And, in general, statutes authorizing the removal of the disabilities of infants are held to refer only to cases where the minor is shown to have sufficient discretion to prudently manage his own affairs, and are never construed to embrace, as among those whose disabilities may be removed, infants of tender years who might become the easy prey of designing parties and thereby be greatly injured in their person or estate.⁵ These statutes are an innovation upon the common law, and their requirements must be strictly followed, and every jurisdictional and other fact necessary to make them effective must affirmatively appear of record.⁶ Before an infant will be permitted to litigate a cause in his own name and right by virtue of a judgment of a court of competent jurisdiction, he will be required to exhibit and prove, as the rules of evidence require, the record and judgment of the court removing his disabilities, and that the proceedings were regular.⁷

§ 704. Removal of disabilities of infancy — Extraterritorial effect of laws authorizing.—Generally speaking, the laws of the domicile of the citizen fix his civil status wherever he may go. A female who attains her majority by the laws of the state of her *bona fide* domicile is *sui juris* in any state into which she may go. The status thus attained follows the per-

¹ Wilson v. Craighead, 6 Rob. (La.) 429.

² Merriman v. Sarlo, 63 Ark. 151, 87 S. W. Rep. 879.

³ Succession of Lyne, 12 La. Ann. 155; Succession of Gaines, 42 La. Ann. 699, 7 S. Rep. 788.

⁴ Coleman, Ex parte, 54 Ark. 235, 15 S. W. Rep. 470. But see State v. Baker, 25 Fla. 598, 6 S. Rep. 445.

⁵ Doles v. Hilton, 48 Ark. 305, 3 S. W. Rep. 193.

⁶ Hindman v. O'Connor, 54 Ark. 627, 16 S. W. Rep. 1052; Brown v. Wheelock, 75 Tex. 385, 12 S. W. Rep. 111; Emancipation of Pocheln, 41 La. Ann. 331, 6 S. Rep. 541.

⁷ Pinchback v. Graves, 42 Ark. 222.

son just as a shadow follows a substance. Were this not true, a person might be of age one day, and the next, upon entering another state or country, would be an infant. Returning again, perhaps immediately, he would at once be re-transformed, as it were, into full maturity.¹ The contrary has been held also,² but this is clearly opposed to the best reasoning as well as the decided weight of authority.

§ 705. Estates of infants — Preservation — Cost of — Who liable for.—The law jealously guards the property of infants to prevent fraud, or even temptation to defraud, on the part of others. No one will be permitted to occupy the property of an infant and make such permanent or extravagant improvements as to practically make the minor unable to pay for them. As it is sometimes expressed, "they cannot be improved out of their estates." When their property is occupied by another, therefore, such other will only be entitled to compensation for such repairs and improvements as are absolutely necessary to preserve the property from waste or serious depreciation in value.³ If a trespasser, however, take possession of the property of an infant and make valuable and permanent improvements with which the minor cannot be charged, he will not be liable to the infant for the value of the property as thus improved, but only for what it would be worth without such improvements.⁴

§ 706. Liability of infants for costs.—Generally no judgment can be rendered against an infant for costs where he is sued alone and as an individual without making his guardian or other representative a party to the action.⁵ But when an infant is convicted of a crime his estate is liable for the fine as well as for the costs, as the latter are part of and incident to the punishment, and an infant, having arrived at years of discre-

¹ Woodward v. Woodward, 3 Pick. (Tenn.) 644, 11 S. W. Rep. 892; Wharton, Confl. Laws, § 114; Saul v. His Creditors, 5 Mart. (La. N. S.) 569, 8 Mart. (La. O. S.) 665. See also Commonwealth v. Hamilton, 6 Mass. 273.

² State v. Bunce, 65 Mo. 349.

³ McCloy v. Arnett, 47 Ark. 445, 452, 2 S. W. Rep. 71; Sparkman v.

Roberts, 61 Ark. 26, 31 S. W. Rep. 742; Reynolds v. Reynolds, 55 Ark. 369, 18 S. W. Rep. 377.

⁴ Reynolds v. Reynolds, 55 Ark. 369, 18 S. W. Rep. 377; Sparkman v. Roberts, 61 Ark. 26, 31 S. W. Rep. 742.

⁵ Perryman v. Burgster, 6 Porter (Ala.), 99; Sproule v. Botts, 5 J. J. Marsh. (Ky.) 162.

tion, is amenable to the criminal laws just as adults.¹ In Massachusetts an infant is held to be liable to the defendant where he brings an action as plaintiff, though he sue by next friend. This ruling, however, seems to be predicated upon the statute of this state.² The fact that a statute provides that a next friend representing an infant in litigation shall be responsible for the costs in the action does not mean that he must, as a condition of his right to sue in such capacity, be able financially to pay the costs; but that only in the event the litigation of the infant be unsuccessful, judgment will be authorized and may be rendered against the next friend for the costs.³ And where an infant sues without *prochein ami* or guardian it has been held that his estate will be liable for the costs.⁴ Costs against an infant will never be allowed, however, unless it appears that the action against the infant was in good faith.⁵ And when the action by the next friend terminates before the infant attains his majority, the next friend will be liable for the costs, unless there be a fund in court belonging to the infant which the court may appropriate to the payment of the costs.⁶ But generally where the infant sues by next friend the latter has the control of the litigation, is in a large measure responsible therefor, and if it appear that the action should not have been brought, the costs will be adjudged against the representative of the infant instead of the infant himself.⁷ No doubt the estate of an infant would be liable for the costs in an action to redress a wrong or tort committed by the infant, for the infant is liable for this, while upon contract he would not be, as his contracts are not enforceable against him during infancy; and it is difficult to see how costs could properly be adjudged against an infant in an action against him during his infancy upon contract, for he may wait until he attains majority, then disaffirm his contract,

¹ Beasley v. State, 2 Yerg. (Tenn.) 481.

² Smith v. Floyd, 1 Pick. (Mass.) 275; Parsons v. Jones, 9 Mass. 106; Crandall v. Slaid, 11 Metc. (Mass.) 288.

³ Rabidon v. Muskegon Circuit Judge (Mich.), 68 N. W. Rep. 147.

⁴ Finley v. Jowle, 13 East, 6; Gardiner v. Holt, 2 Str. 1217.

⁵ Pearce v. Pearce, 9 Ves. 548; Waring v. Crane, 2 Paige Ch. 79.

⁶ Waring v. Crane, 2 Paige Ch. 79.

⁷ Waring v. Crane, 2 Paige Ch. 79; Bouche v. Ryan, 3 Blackf. (Ind.) 472; Perryman v. Burgster, 6 Porter (Ala.), 99; Sproule v. Botts, 5 J. J. Marsh. (Ky.) 162; Willson v. McGee, 2 A. K. Marsh. (Ky.) 601.

and by so doing may completely deprive his adversary of any right of action whatever thereunder; and certainly there can be no right in a third person to recover costs in an action on contract when the action itself cannot be maintained. But no judgment can be rendered against the next friend unless authorized by statute. The remedy against him is by attachment.¹

§ 707. **Liability of infant for costs — Exception to general rule.**— While an infant is not liable, generally speaking, for costs in an action against him by a stranger upon contract, or otherwise where the infant by law is not liable in the action, yet where, by statute, an infant is authorized to sue in his own name by next friend, and such next friend sues for his infant in good faith, and under the superintending control of the court, and there is no fraud or lack of good faith on the part of the representative of the infant, it seems to be settled that the estate of an infant will be liable for costs adjudged against him in such action.² But where the statute authorizing an infant to sue by guardian or next friend fixes a liability for costs on such representative, the infant himself is not liable for costs, may repudiate the judgment and thereby effect this immunity.³ And when a statute permits a litigant to sue *in forma pauperis* when unable to give security for costs, this applies to infants suing by next friend as well as to others.⁴ And the solvency of the next friend would not, upon principle, preclude the infant from the right to sue if he himself be unable to pay costs, as the infant is the real, and the next friend only the nominal, party. Of course the right to sue by next friend is confined to infants. Adults cannot thus sue.⁵

§ 708. **Right of infants to recover for injury.**— An infant has a right to recover from a wrong-doer for any injury inflicted upon him. This embraces a right to recover not only such damages as may result to him after attaining his majority, but

¹ Turner v. Turner, 2 Str. 708; Willson v. McGee, 2 A. K. Marsh. (Ky.) 600.

² Brown v. Hill, 16 Vt. 673; Smith v. Floyd, 1 Pick. (Mass.) 273; Albee v. Winterink, 55 Iowa, 184, 7 N. W. Rep. 533.

³ Kliffel v. Bullock, 8 Neb. 336, 1 N. W. Rep. 52.

⁴ Missouri Pac. Ry. Co. v. Cooper, 57 Kan. 185, 45 Pac. Rep. 586.

⁵ Shirley v. Hagar, 3 Blackf. (Ind.) 225.

for those resulting during infancy as well. But in order to recover for the damages resulting during infancy, it is incumbent on the injured one to show that he has been manumitted by his parents, as otherwise they, and not himself, will be entitled to any damages resulting in loss of services during minority, though of course the infant might recover, even though not manumitted, for any physical suffering resulting from the injury while an infant.¹

§ 709. Negligence of infants — General rule.—The general rule is, an infant, unless he has arrived at years of discretion, is not responsible for his negligence, nor, on the other hand, is he chargeable therewith as a defense to an action for an injury by another because of negligence at the hands of such other, though the negligence of the infant may have contributed to the injury. This rule of law is correctly announced by the supreme court of the United States in the following apt language: "It is well settled that the conduct of an infant of tender years is not to be governed by the same rule which governs that of an adult. While it is the general rule in regard to an adult, that, to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case."² And the same court, in a previous case, stated the same rule in the following very explicit and clear language: "Of a

¹ *Atlanta & W. P. R. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. Rep. 763; *Judd v. Ballard*, 66 Vt. 668, 30 Atl. Rep. 96.

² *Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall. 657; *Thurber v. Harlem Bridge & F. R. R. Co.*, 60 N. Y. 326; *Evansich v. Gulf, C. & S. F. Ry. Co.*, 57 Tex. 126, 128; *Huff v. Ames*, 16 Neb. 139, 19 N. W. Rep. 623; *Westerfield v. Levis*, 48 La. Ann. 63, 9 S. Rep. 52; *Gunn v. Ohio River R. R. Co. (W. Va.)*, 26 S. E. Rep. 546; *Chicago, B. & Q. R. R. Co. v. Grablin*, 38 Neb. 90, 56 N. W. Rep. 796; *City of Evansville v. Senhenn (Ind.)*, 47 N. E. Rep. 634; *Lynch v. Smith*, 104 Mass. 52; *Gibbons v. Williams*, 135 Mass. 333; *Brinkley Car Co. v. Cooper*, 60 Ark. 545, 31 S. W. Rep. 154; *Birge v. Gardiner*, 19 Conn. 507; *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; *Keffe v. Milwaukee R. Co.*, 21 Minn. 207; *Evansich v. Railway Co.*, 57 Tex. 126; *Washington & G. R. R. Co. v. Gladmon*, 15 Wall. 401; *Pennsylvania R. R. Co. v. McTighe*, 46 Pa. St. 316; *O'Mara v. Hudson R. R. Co.*, 38 N. Y. 445; *Morgan v. Brooklyn City R. R.*, 38 N. Y. 455; *Smith v. O'Connor*, 48 Pa. St. 218; *Ranch v. Lloyd*, 31 Pa.

child three years of age, less caution would be required than of one of seven; of a child of seven years, less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child."¹ A child of only two years or younger is not chargeable with, nor capable of, contributory negligence in law;² nor a child who is under the age of five years;³ nor one six years old.⁴

§ 710. Age at which a minor may be charged with negligence.—The law, in order to ascertain a reliable age at which to charge an infant with the responsibilities of his negligent acts, has taken the age at which he is chargeable, under the criminal law, for the commission of a crime, as a guide. This age is usually fixed at fourteen years. At and after this age the presumption is he is sufficiently informed as to be aware of the consequences of his negligence, and before the contrary presumption obtains, though this will depend much upon the circumstances of each case and whether the danger superinduced by such negligence be so palpable as to be apparent to one under this age.⁵ An infant over fourteen years may recover for an injury caused by his ignorance of the dangers of his employment, as there is no presumption merely from the fact that he has reached this age that he is thoroughly familiar with the machinery and appliances he is directed to use.⁶

St. 358; *Pennsylvania R. R. Co. v. Kelly*, 81 Pa. St. 372; *Robinson v. Cone*, 22 Vt. 213; *Galveston R. R. Co. v. Moore*, 59 Tex. 54.

¹ *Washington & G. R. R. Co. v. Gladmon*, 15 Wall. 401; *Birge v. Gardiner*, 19 Conn. 507; *Boland v. Missouri R. R. Co.*, 36 Mo. 484; *Galveston, H. & H. Ry. Co. v. Moore*, 59 Tex. 64; *Robinson v. Cone*, 22 Vt. 213.

² *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 71; *Frick v. St. Louis, K. C. & N. Ry. Co.*, 75 Mo. 542; *Chicago W. D. Ry. Co. v. Ryan*, 131 Ill. 474, 23 N. E. Rep. 385; *Newman v. Phillipsburg H. C. R. R. Co.*, 52 N. J. Law, 446, 19 Atl. Rep. 1102; *Bottoms v. Seaboard & R. R. Co.*, 114 N. C. 690, 19 S. E. Rep. 730.

³ *Chicago & A. R. R. Co. v. Gregory*, 58 Ill. 226; *Baltimore & O. R. R. Co.*

v. State, 30 Md. 47; *Erie City P. Ry. Co. v. Schuster*, 113 Pa. St. 412; *Norfolk & R. R. Co. v. Ornesby*, 27 Gratt. (Va.) 455; *Westerfield v. Lewis*, 43 La. Ann. 63, 9 S. Rep. 52; *Shippy v. Au Sable*, 85 Mich. 280, 48 N. W. Rep. 584; *Westbrook v. Mobile & O. R. R. Co.*, 66 Miss. 560; *Rice v. Crescent City R. Co. (La.)*, 24 S. Rep. 791.

⁴ *Chicago City Ry. Co. v. Wilcox*, 33 Ill. App. 450; *Galveston, H. & H. Ry. Co. v. Moore*, 59 Tex. 64.

⁵ *Chicago & C. R. R. Co. v. Becker*, 76 Ill. 32; *Rockford & C. R. R. Co. v. Delancy*, 83 Ill. 198; *Nagle v. Allegheny R. R. Co.*, 88 Pa. St. 35. And see *Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. Rep. 910.

⁶ *Atlanta & W. P. R. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. Rep. 763.

§ 711. Negligence — Question of fact.— Whether or not an infant is guilty of negligence or contributory negligence so as to be barred, because thereof, from a recovery for an injury inflicted upon him at the hands of a third person must depend, to a great extent, upon the facts and circumstances of each case. Usually the question will be one of fact, and this must be determined in the light of the age and intelligence of the child and the facts, circumstances and surroundings of the particular case. These considerations must serve as the best and most accurate guide, and, observed with intelligent impartiality, are supposed in law to afford the best way to arrive at a proper conclusion.¹

§ 712. Duty of third person to maintain safe premises.— An infant, especially one of tender years and without discretion, is not expected in law to have the mature prudence, caution and forethought possessed by adults. The law, therefore, for their personal protection, requires a certain degree of prudence at the hands of others in averting any injury to those who are lacking in discretion by reason of their tender years. In the performance of this duty the owner of property of any kind in the management, control or operation thereof is not required to provide against remote or improbable contingencies whereby those of indiscreet years wander or go upon his premises or property and are injured. But such owner is liable to infants, though they be trespassers, when it is known to him that they probably go upon his property, or are accustomed to do so, and that “from the peculiar nature or exposed and open condition of something thereon which is attractive to children, he ought reasonably to anticipate such an injury to a child as that which actually occurs.”² In the nature of things, whether the owner of property has exercised the prudence and caution

¹ *Huff v. Ames*, 16 Neb. 139, 19 N. W. Rep. 623; *Young v. Clark* (Utah), 50 Pac. Rep. 832; *Klatt v. N. C. Lumber Co.* (Wis.), 73 N. W. Rep. 563; *Birge v. Gardiner*, 19 Conn. 507.

² *Brinkley Car Co. v. Cooper*, 60 Ark. 545, 31 S. W. Rep. 155; *Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall. 657; *Gulf, C. & S. F. Ry. Co. v. McWhirter*, 77 Tex. 356, 14 S. W. Rep. 26; *Evansich v. Gulf, C. & S. F. Ry. Co.*, 57 Tex. 126; *G., H. & H. Ry. Co. v. Moore*, 59 Tex. 64; *Keffe v. Milwaukee R. Co.*, 21 Minn. 207; *Bransom v. Labrot*, 81 Ky. 638; *Stafford v. Rubens*, 115 Ill. 196, 3 S. E. Rep. 568; *Mayhew v. Burns*, 103 Ind. 323, 2 N. E. Rep. 793.

enjoined upon him by law will be a question of fact whenever there is any material and legitimate evidence tending to show that proper care and prudence have not been exercised. The correct solution of the question will frequently depend largely upon the age and discretion of the infant, the dangerous or inviting nature of the premises, and other similar surrounding facts and circumstances.

§ 713. Imputed negligence.—The law exacts of all persons a certain degree of care towards infants. This duty is much higher than that owing to adults or those who have attained years of discretion, when the law presumes that they are capable of judging of the consequences of their own negligence. But the rights of those of tender years, because of their undeveloped faculties and inexperience with the world and its ways, are not to be jeopardized by the negligence of others. The rule, therefore, is, so far as the right of the infant to recover individually for any negligence of another, resulting in his personal injury, is concerned, the concurring negligence of others contributing thereto, whether they be strangers or the parents of the child, cannot be imputed to the infant himself, and will not defeat a recovery by him for the injury. In other words, an infant who is so young as not to be capable of fully understanding the danger and consequences of his act of negligence is not bound thereby nor chargeable therewith, and the fact that third parties are also guilty of negligence cannot serve to prevent a recovery by the infant for an injury brought about by the negligence of another.¹ The contrary position

¹ *Government St. R. R. Co. v. Hanlon*, 53 Ala. 70; *Huff v. Ames*, 16 Neb. 139, 19 N. W. Rep. 623; *Gulf, C. & S. F. Ry. Co. v. McWhirter*, 77 Tex. 356, 14 S. W. Rep. 26, *Bottoms v. Seaboard & R. R. Co.*, 114 N. C. 699, 19 S. E. Rep. 730; *Evansville v. Senhenn (Ind.)*, 47 N. E. Rep. 634; *Newman v. Phillipsburg Horse Car Co.*, 52 N. J. Law, 446, 19 Atl. Rep. 1102; 2 Wood, *Ry. Law*, § 322; *Chicago City Ry. Co. v. Wilcox*, 33 Ill. App. 450; *Baltimore & O. R. R. Co. v. State*, 30 Md. 47; *St. Louis, I. M. & S. Ry. Co. v. Freeman*, 36 Ark. 41; *Daley v. Norwich & W. R. R. Co.*, 26 Conn. 591; *Ferguson v. Columbus & R. R. Co.*, 77 Ga. 102; *Boland v. Missouri R. R. Co.*, 36 Mo. 484; *Frick v. St. Louis, K. C. & N. Ry. Co.*, 75 Mo. 542; *Bellefontaine & Ind. R. R. Co. v. Snyder*, 18 Ohio St. 399; *Glassey v. Hestonville, M. & F. P. Ry. Co.*, 57 Pa. St. 172; *North Pa. R. R. Co. v. Mahoney*, 57 Pa. St. 187; *Cleveland, C., C. & I. R. R. Co. v. Manson*, 30 Ohio St. 451; *Robinson v. Cone*, 22 Vt. 213; *Chicago W. Div. Ry. Co. v. Ryan*, 131 Ill. 474, 23 N. E. Rep. 385; *Bellefontaine Ry. Co. v. Snyder*, 24 Ohio St. 670; *Erie City P.*

has been taken by respectable authority.¹ And where a father, in alighting from a moving train with his child twelve years old in his arms, fell and the infant was injured, it was held she could not recover.²

§ 714. Authority of courts of chancery over real estate of infants.— Usually, when not otherwise provided by statute, the chancery courts exercise a kind of paternal control over the estates of all infants. They may direct the disposition of the uses and profits of the realty, and the sale and application of the proceeds to such use as may be most beneficial to the minor. But further than this, unless specially authorized by statute, courts of equity cannot go. They have no authority inherently to order a sale or even an incumbrance of the property of an infant.³ Such a sale being void and without authority of law may be attacked collaterally.⁴ In Alabama and some other states, however, chancery courts have jurisdiction in such matters and exercise a kind of general superintending control over the estates and interests of infants.⁵ Sometimes the jurisdiction in chancery over matters of this kind is vested by statute. But usually the authority over the estates of infants is

Ry. Co. v. Schuster, 113 Pa. St. 412, 6 Atl. Rep. 269; Galveston, H. & H. Ry. Co. v. Moore, 59 Tex. 64; Norfolk & P. R. R. Co. v. Ormsby, 27 Gratt. (Va.) 455; Daniel v. Whirley, 1 Head (Tenn.), 610, 620; Shippy v. Au Sable, 85 Mich. 280, 48 N. W. Rep. 584; Winters v. Kansas City Cable Ry. Co., 99 Mo. 509, 12 S. W. Rep. 62; Norfolk & W. R. R. Co. v. Groseclose's Adm'r, 88 Va. 267, 13 S. E. Rep. 454; McNamara v. Beck (Ind.), 52 N. E. Rep. 707; Ploof v. Burlington Tr. Co. (Vt.), 41 Atl. Rep. 1017.

¹ Hartfield v. Roper, 21 Wend. 615; Gibbons v. Williams, 135 Mass. 333; Fitzgerald v. St. Paul, M. & M. Ry. Co., 29 Minn. 336, 13 N. W. Rep. 168; Meeks v. Southern Pac. R. R. Co., 52 Cal. 602; Atchison, T. & S. F. R. R. Co. v. Smith, 28 Kan. 511, 557; Wright v. Walden, 4 Allen (Mass.), 283; Holly v. Boston G. L. Co., 8 Gray (Mass.), 123; Brown v. European & N. A. Ry.

Co., 58 Me. 384; Callahan v. Bean, 9 Allen (Mass.), 401.

² Morrison v. Erie R. Co., 56 N. Y. 302.

³ Rodgers v. Dill, 6 Hill, 415; Forman v. Marsh, 11 N. Y. 544; Baker v. Lorillard, 4 N. Y. 257; Horton v. McCoy, 47 N. Y. 21, 26; Russell v. Russell, 1 Mol. (Ir. Ch.) 525; Losey v. Stanley, 147 N. Y. 560, 42 N. E. Rep. 8; Hoback v. Miller (W. Va.), 29 S. E. Rep. 1014.

⁴ Losey v. Stanley, 147 N. Y. 560, 42 N. E. Rep. 8.

⁵ Ex parte Jewett, 16 Ala. 409, 410; Goodman v. Winter, 64 Ala. 410, 435; Thornington v. Thornington, 82 Ala. 489, 1 S. Rep. 716. See, too, Dorsey v. Gilbert, 11 Gill & J. (Md.) 89; Taylor v. Peabody Heights Co., 65 Md. 388, 4 Atl. Rep. 886. A similar rule obtains in Illinois. Gorman v. Mullins (Ill.), 50 N. E. Rep. 222.

lodged in courts of probate or similar courts, through and by authority of which, generally speaking, all things pertaining to the estates of infants must pass and be authorized. No sale can be valid unless the formalities and requirements of law with regard to petition for authority to make it be complied with; and upon the granting of the authority to sell, the faithful following out of the requirements of the order of the court, and all the provisions of law with reference to notice, time, manner of sale, etc., must be observed.¹ As the subject is usually one of statutory regulation, the prudent practitioner will always consult his local laws affecting the rights of infants with reference to the disposition of their property.

§ 715. Rights of infants in appellate courts — Waiver.—

An infant does not waive his rights by failing to comply with the ordinary rules of practice required of adults by the appellate courts. It is usual for these tribunals to thoroughly investigate any legal rights of those charged with a felony, though the ordinary rules of procedure would generally forbid this. So, in order that an infant, who is presumed not to be competent to take proper care of his cases in court, will be likewise favored, though he fail to prosecute his appeal properly, neglect to do so, or otherwise fail to assert a right at all,² he is entitled to the benefit of any defense on appeal which might have been interposed in his behalf in the lower court, though no such rights were asked in the latter court.³ An affidavit or other formality necessary to perfect or obtain an appeal against an infant cannot be waived by him.⁴ An infant may for the first time object, on appeal, to the jurisdiction of the court or other irregularities.⁵ An appellate court will interpose the statute of limitations in behalf of infants on appeal, though this was not done in the lower court.⁶ And they may appeal from a judgment to their prejudice by next friend,

¹ *Ingram v. Wilson* (Ky.), 44 S. W. Rep. 420. *Allen v. Smith*, 25 Ark. 495; *Branch v. Mitchell*, 24 Ark. 431.

² *Tillar v. Cleveland*, 47 Ark. 287, 1 S. W. Rep. 516; *Kempner v. Dooley*, 60 Ark. 526, 31 S. W. Rep. 145. ⁴ *Trapnall v. Burton*, 24 Ark. 371.

³ *Trapnall v. Burton*, 24 Ark. 371; *Lefevre v. Laraway*, 22 Barb. 167; ⁵ *Branch v. Mitchell*, 24 Ark. 431. ⁶ *Alling v. Alling*, 52 N. J. Eq. 92, 27 Atl. Rep. 655.

though they were represented by a guardian *ad litem*, the latter failing to assert their rights on appeal in a reasonable time.¹

§ 716. Personal injury to infants — Release — Effect of.— Where an infant is injured at the hands of a wrong-doer he cannot preclude himself from a right of recovery by the execution, during minority, of a release renouncing all rights of action, or acknowledging satisfaction for the wrong. This would be no more than a contract, and he cannot be bound by such an agreement any more than upon a promissory note or other contractual undertaking.² So, a release by an infant of any other right, as of a legacy, for instance, will not bind him nor estop or preclude him from afterwards asserting every right which he might have asserted but for the execution of such release.³ Such an agreement may be repudiated by the infant in the same way that an ordinary contract might be.⁴ And the bringing of an action for the injury or assertion of other right released upon arriving at majority is an effective renunciation and disaffirmance of the release.⁵ Of course the payment of a sum in satisfaction of the wrong to the parent or other person for the infant would not preclude him from asserting his rights.⁶ Nor, indeed, would payment or satisfaction, whether ample or otherwise, preclude him from suing upon the cause of action when he reaches the proper age. He could no more bind himself by receiving the money than he could by his written or verbal release surrendering his right of action.⁷

§ 717. Infant may act as agent, trustee or representative of another.— While an infant may not make a binding contract for himself, yet this will not preclude him from acting in the capacity of agent, trustee or other representative of another. As such representative he may, within the scope of the authority conferred upon him by his adult principal, execute

¹ Carlton v. Miller, 2 Tex. Civ. App. 619, 21 S. W. Rep. 697.

² Palmer v. Conaut, 58 Hun, 333, 11 N. Y. S. 917; St. Louis, I. M. & S. Ry. Co. v. Higgins, 44 Ark. 293.

³ Lanford v. Frey, 8 Humph. (Tenn.) 443.

⁴ St. Louis, I. M. & S. Ry. Co. v. Higgins, 44 Ark. 293.

⁵ St. Louis, I. M. & S. Ry. Co. v. Higgins, 44 Ark. 293.

⁶ Palmer v. Conaut, 58 Hun, 333, 11 N. Y. S. 917.

⁷ St. Louis, I. M. & S. Ry. Co. v. Higgins, 44 Ark. 293.

any contract or agreement which he is authorized to do, and the same will be effective. His power to act in such cases emanates from that conferred and vested by one who has authority to act for himself, and this authority may be delegated to an infant as well as to an adult.¹ Where, therefore, an infant holds the legal title to land as trustee for another, he may, at the instance of the trustee, make a good and valid conveyance thereof.² And a contract made by an infant acting for another in the capacity of agent under due authority cannot be avoided by the infant himself, for he has not been injured, nor by the principal; for, while the latter may have a grievance, it was brought about by the duly-authorized act of his agent, which in law is the act of the principal; and the principal, of course, cannot complain of his own acts, no matter what the consequences may be.³ Neither can the contracts of an infant in fulfillment of a trust, and acting in the capacity of trustee, be avoided by the infant or any one else on the ground of infancy.⁴ In fact, an infant may be required to perform a trust by a court of equity.⁵

§ 718. **Authority of infants to appoint agents.**—An infant is usually held incompetent to appoint an agent or otherwise delegate authority.⁶ The reason upon which this ruling is grounded is a forcible one. In the first place, an infant can, upon principle, confer no greater power than he has. The agent, therefore, could do nothing that the infant could not do, and consequently all his acts would be voidable at the option of the infant. Further, though the infant might employ his agent for a specified time, and vest in him certain authority, yet this authority could be revoked at the pleasure of the in-

¹ *Des Moines Ins. Co. v. McIntire* (Iowa), 68 N. W. Rep. 565; *Bridges v. Bidwell*, 20 Neb. 185, 29 N. W. Rep. 302; *State v. Toland*, 36 S. C. 515, 15 S. E. Rep. 599.

² *Des Moines Ins. Co. v. McIntire* (Iowa), 68 N. W. Rep. 565.

³ *Shaffer v. Kennington*, 61 Ill. App. 59.

⁴ *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. Rep. 599.

⁵ *Prouty v. Edgar*, 6 Iowa, 353;

Starr v. Wright, 20 Ohio St. 97; *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. Rep. 599.

⁶ *Cole v. Pennoyer*, 14 Ill. 158; *Holden v. Curry*, 85 Wis. 504, 55 N. W. Rep. 965; *Turner v. Bondalier*, 81 Mo. App. 582; *Vogelsang v. Null*, 67 Tex. 465, 3 S. W. Rep. 451; *Lawrence v. McCarter*, 10 Ohio, 87; *Knox v. Flack*, 22 Pa. 337; *Wamhole v. Foot*, 2 Dak. 1, 2 N. W. Rep. 239; *Bennett v. Davis*, 6 How. (Miss.) 333.

fant without waiting until the expiration of the time for which the agent was appointed, and meanwhile all the acts of the agent could be obliterated by a single word of repudiation from the infant. The law wisely holds, therefore, that the infant has no authority to appoint an agent, for the appointment of such a representative implies that the person appointing has authority to act for himself.

§ 719. **Authority to execute power of attorney.**— Whether or not an infant may execute a valid power of attorney does not seem very clear from the authorities. Upon principle, perhaps, the better idea is that he cannot; for when he authorizes another to act for him, the act of the agent thus authorized cannot bind the infant irrevocably, for this would have the effect of depriving him of the protection the law gives to the extent that he might thus act through the medium of a designated and appointed third party. To be sure the authority thus conferred may be revoked by the infant at any time;¹ but the revocation of the power of attorney or authority of an agent could not serve to nullify any of the acts of such representative done while his authority was in force. The acts of the attorney in fact, or agent, would all have to be severally repudiated by the infant; and he might not know of all of them, which fact, with others, might bring about serious confusion and embarrassment. It has therefore been held with good reasoning, that a warrant of attorney by an infant authorizing another to confess judgment, together with the judgment rendered by virtue of that authority, are void.² A joint warrant by an infant and another authorizing the confession of a judgment against both is void as to the infant only, and binding as to the party thereto who is *sui juris*.³ A judgment against an infant rendered upon a void power of attorney authorizing the confession of the same for the infant will be vacated and set aside upon motion in the case setting up the fact of infancy, properly supported by proof.⁴ Such

¹ Pickler v. State, 18 Ind. 266.

Belloff, 53 N. J. Eq. 298, 31 Atl. Rep.

² Knox v. Flack, 22 Pa. St. 337; 604.

Motteux v. Aubin, 2 Wm. Bl. 1133;

³ Motteux v. Aubin, 2 Wm. Bl. 1133.

Bennett v. Davis, 6 Cowen, 393; Oli-

⁴ Waples v. Hastings, 8 Harr. (Del.)

ver v. Woodroffe, 4 M. & W. 649;

403; Karcher v. Green, 8 Houst. (Del.)

Fagua v. Sholen, 60 Ill. 140; Lang v.

163, 32 Atl. Rep. 225.

power of attorney being absolutely void, it cannot be validated by a ratification on the part of the infant, for there is nothing to ratify.¹ The principle upon which this rule rests is that an act or contract, in order to be capable of ratification, must be voidable only, not positively void. And it is easy to see that a thing which is a nullity cannot be inspired with vitality merely by a recognition of its entity.

§ 720. Infants are not bound by the law of estoppel.—As infants are not supposed to know the legal effect and consequences of their contracts, they are not held bound by them as a rule; and being thus ignorant of the effect of their acts, and especially contracts which, in an adult, might serve to bring about an estoppel, they are not precluded either by their contracts, conduct or declarations from asserting any right which, but for their minority, they would be forbidden to insist on.² So an infant may avoid his deed executed during infancy, though he represented to his grantee at the time of execution that he was then of full age.³ “Infants, even by their own false representations of their age or otherwise to those with whom they contract, cannot denude themselves of the protection thrown around them by the policy of the law so as to be bound by their alienation of rights already acquired, or by contracts for the future.”⁴ Indeed, the law is very cautious in holding an infant liable even for his fraudulent

¹ *Waples v. Hastings*, 3 Harr. (Del.) 403.

² *Lackman v. Wood*, 25 Cal. 147; *McCoon v. Smith*, 3 Hill (N. Y.), 147; *Brown v. McCune*, 5 Sandf. 224; *Carolina Inter-state Building & L. Ass'n v. Black*, 119 N. C. 323, 25 S. E. Rep. 975; *New York Building & L. Ass'n v. Fisher*, 20 Misc. Rep. 242, 45 N. Y. S. 795; *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. Rep. 176; *Sims v. Everhardt*, 102 U. S. 300; *Wieland v. Kobick*, 110 Ill. 16; *Schnell v. Chicago*, 38 Ill. 383; *Price v. Jennings*, 62 Ind. 111; *Harmon v. Smith*, 38 Fed. Rep. 482; *Burdett v. Williams*, 30 Fed. Rep. 697; *Bloomingtondale v. Chittenden*, 75 Mich. 305, 42 N. W. Rep. 166; *Rowe v. Griffiths* (Neb.), 78 N. W. Rep. 20.

³ *Carolina Inter-state Building & L. Ass'n v. Black*, 119 N. C. 323, 25 S. E. Rep. 975.

⁴ *Walston v. Billings*, 38 Ark. 278, 281; *Carpenter v. Carpenter*, 45 Ind. 142; *Conrad v. Lane*, 26 Minn. 389; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Studwell v. Shapter*, 54 N. Y. 249; *Whitcomb v. Joslyn*, 51 Vt. 79; *Wieland v. Kobick*, 110 Ill. 16; *Gibson v. Spear*, 38 Vt. 311; *Burley v. Russell*, 10 N. H. 184; *Sims v. Everhardt*, 102 U. S. 300; *Alt v. Goff*, 65 Minn. 191, 68 N. W. Rep. 9; *McKaney v. Cooper*, 81 Ga. 679, 8 S. E. Rep. 312; *Burdett v. Williams*, 30 Fed. Rep. 697; *Vogelsang v. Null*, 67 Tex. 465, 3 S. W. Rep. 451; *Ferguson v. Bobo*, 54 Miss. 121.

representations; for, as was well said by Chancellor Kent: "Infants would lose all protection if they were to be bound by their contracts made by improper artifices or the heedlessness of youth before they had learned the value of character and the just obligation of moral duties."¹ But while this is generally true in civil cases, yet an infant is liable under criminal laws which forbid the obtaining of property under false pretenses where he gets possession of same through a contract by falsely and intentionally representing himself to be *sui juris*.² Here the contract becomes a crime against the law of the land. And as an infant is amenable to the criminal laws when he has attained sufficient age, he cannot escape this liability to prosecution and punishment simply because the way in which he effected the violation of law was by means of a contract forbidden by law to be made, and for the making of which a punishment and penalty are prescribed binding on all persons having sufficient understanding to commit a crime though under the age of majority.

§ 721. Statute of limitations — When infants bound by.— While, as a general rule, statutes of limitation make an exception in favor of infants and give them a certain period after the removal of the disability of infancy in which to assert their rights, yet, where a statute of limitations is general in its necessary effect, and there is no exception made for infants or others under disability of any kind, the statute will run against them and bar their rights as effectively as in the case of an adult. The rule is, where the statute makes no exception, the courts can make none.³

§ 722. Statute of limitations.— As a rule, an infant is not precluded by the statute of limitations. He cannot enforce his rights until he arrives at maturity — at least may wait until maturity to do so,— while an adult may not postpone the bringing

¹ 2 Kent, Comm. 240, 241; Watson v. Kleyla, 104 Ind. 223, 4 N. E. Rep. v. Billings, 38 Ark. 278, 282; Geer v. 16; Davis v. Muskegon (Mich.), 69 N. W. Rep. 670; Warfield v. Fox, 53 Pa. Hovey, 1 Root (Conn.), 179.

² Neff v. Landis, 110 Pa. St. 204, 1 St. 382; Thompson v. Sherrill, 51 Ark. Atl. Rep. 177. 453, 11 S. W. Rep. 689; Howell v.

³ State Bank v. Morris, 13 Ark. 291; Hair, 15 Ala. 194; Dozier v. Ellis, 28 Pryor v. Ruburn, 16 Ark. 671; Wright Miss. 730.

of his action. So the ruling of all the courts is, the statute of limitations does not begin to run against an infant, as a general rule, during minority.¹ Of course, the law can bind infants by the operation of the statute of limitations, but they are generally excepted from its provisions because of the principle that the statute ought not to run against one incapable of asserting his rights until this impediment is removed.

§ 723. Statute of limitations — Rule where statute has begun to run before right of infant accrues.— The disability of infancy, even where the statute saves the rights of infants from the operation of the law, will not stop the running of the statute where it has once been set in motion.² Where, therefore, the statute of limitations has begun to run against an ancestor, the fact that a devisee under the will of such ancestor is an infant at the time of the death of the ancestor will not arrest the running of the statute.³ The same rule applies, of course, where the statute began to run against the ancestor before his death and where he died intestate. His heirs then are bound by the statute if its operation was started in the life-time of the ancestor.⁴ While this rule of law may work some hardship and even occasional injustice the wisdom of the rule is apparent. It is to assure at some time a state of peace from litigation concerning property rights which should be at rest in order that they have proper stability. For, were it otherwise, it would be possible, by tacking disability after

¹ *Whittington v. Doe*, 9 Ga. 23; *Johns*, 165; *Campbell v. McFadden*, Harris v. Ross, 86 Mo. 89; *Smith v.* 9 Tex. Civ. App. 379, 81 S. W. Rep. Felter (N. J. L.), 38 Atl. Rep. 746; 436; *Beattie v. Whipple*, 154 Ill. 273, Taylor v. Brymer (Tex. Civ. App.), 42 40 N. E. Rep. 340; *Cunningham v.* S. W. Rep. 999; *Missouri Pac. Ry. Co.* Snow, 82 Mo. 587; *Doe v. Jones*, 4 T. v. Cooper, 57 Kan. 185, 45 Pac. Rep. R. 801; *Bender v. Bean*, 52 Ark. 132, 587; *Fox v. Drewry*, 62 Ark. 316, 35 12 S. W. Rep. 180, 241; *Pim v. St.* S. W. Rep. 533; *Garrett v. Wineburg* Louis, 122 Mo. 654, 27 S. W. Rep. 525. (S. C.), 26 S. E. Rep. 3. And see *Mc-* ³ *Bozeman v. Browning*, 81 Ark. Connell v. Swepston (Ark.), 49 S. W. 364. Rep. 566.

² *Wilkinson v. Dock Co.*, 102 Mo. 130, 14 S. W. Rep. 177; *Bozeman v.* ⁴ *Bender v. Bean*, 52 Ark. 132, 12 S. W. Rep. 180, 241; *McLearan v. Ben-* *Browning*, 81 Ark. 364; *Swearengen* ton, 73 Cal. 329, 14 Pac. Rep. 879; *Al-* *v. Robertson*, 39 Wis. 462; *Rogers v.* *varado v. Nordholt*, 95 Cal. 116, 30 *Brown*, 61 Mo. 187; *Mercer v. Selden*, Pac. Rep. 211; *Castro v. Geil*, 110 Cal. 292, 42 Pac. Rep. 804. 1 How. (U. S.) 37; *Peck v. Randall*, 1

disability, to postpone the right of a claimant indefinitely, and no one would know what to rely on. The rule is a necessity, and serves the purpose of cutting out stale claims after a certain period of time.

§ 724. **Liability of infants for torts — General rule.**— The fact that a person is under the age at which the law authorizes him to make a valid contract or manage his own business and other affairs does not shield him from legal liability for his wrongs or torts not connected with, or growing out of, a contract in any way. For such wrongful acts, at least when the infant is of sufficient age to know right from wrong, or when he has arrived at an age when the law will presume such knowledge on his part, an infant is liable to another.¹ And this has been held to be the case even when the wrongful act is done by the infant in obedience to a command of his parent.² So, if an infant hire a horse to go to a named place, and, instead, goes to another, he is liable to the owner for the conversion of the horse, because such a deviation from his agreement is a conversion at common law of the property, for he had no right to take the horse to any other place than that for which he had proper permission.³ But the remedy of the injured person is to pursue his remedy in tort. He cannot, it has been held, enforce a contract made by the infant in satisfaction of the injury.⁴

¹ *Oliver v. McClelland*, 21 Ala. 675; *School District v. Bragdon*, 23 N. H. 507; *Hanks v. Deal*, 3 McCord (S. C.), 257; *Lewis v. Littlefield*, 15 Me. 283; *Marshall v. Wing*, 50 Me. 62; *Beckley v. Newcomb*, 4 Foster (N. H.), 359, 363; *Conway v. Reed*, 66 Mo. 346; *Morgan v. Cox*, 22 Mo. 373; *Cooley v. Torts* (2d ed.), p. 120; *Baxter v. Busy*, 29 Vt. 465; *Ray v. Tubbs*, 50 Vt. 688; *Wilson v. Garrard*, 59 Ill. 51; *Root v. Stephens*, 24 Ind. 115; *Tift v. Tift*, 4 Denio, 175; *Fitts v. Hall*, 9 N. H. 441.

² *Humphrey v. Douglass*, 10 Vt. 71; *Scott v. Watson*, 46 Me. 362.

³ *Homer v. Thwing*, 3 Pick. (Mass.) 492.

⁴ *Hanks v. Deal*, 3 McCord (S. C.), 257. There is some doubt about the correctness of this decision, for an infant is liable in law for his torts, and

Bristow v. Eastman, 1 Esp. 172; *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Conkling v. Thompson*, 29 Barb. 218; *Bullock v. Babcock*, 8 Wend. 891; *Sikes v. Johnson*, 16 Mass. 888; *Neal v. Gillett*, 23 Conn. 437; *Humphrey v. Douglass*, 10 Vt. 71; *Hutching v. Engle*, 15 Wis. 237; 2 Kent, Comm. 241; *Wallace v. Morris*, 5 Hill (N. Y.), 391; *Shockley v. Shepherd*, 9 Houst. (Del.) 270, 32 Atl. Rep. 173; *Baker v. Morris*, 33 Kan. 580, 7 Pac. Rep. 267; *McCabe v. O'Connor*, 4 App. Div. 354, 38 N. Y. S. 572; *Badger v. Finney*, 15 Mass. 359; *People v. Kendall*, 25 Wend. 399; *Campbell v. Stakes*, 2 Wend. 137; *Hatfield v. Roper*, 21 Wend. 615, 620; *Walker v. Davis*, 1 Gray (Mass.), 506; *Peterson v. Haffner*, 59 Ind. 130;

§ 725. **Liability of infants for torts arising out of contract.**—But while an infant is liable, ordinarily, for his wrong, yet, when the foundation of such wrong is a breach of contract, or has its source in contract, the infant is not liable for such a tort, as he cannot make a contract binding absolutely upon himself during minority except for the necessities recognized by law, and no liability can flow from the breach or any result of a contract which cannot be enforced. So, where one let a horse to an infant for a stated price, and the infant drove it immoderately and thereby injured it, it was held that no action would lie against the infant.¹ But if a minor gets possession of property by virtue of his contract, and, this accomplished, culpably destroys, injures or converts it to his own use, this will be a conversion or injury for which he must respond under the law in tort.² The contract cannot avail the infant except only so long as he remains within its terms; when he goes beyond this, the tort arises and the injury flowing therefrom is recoverable.³ Where an infant hires a horse, but, instead of going the ordinary route to the destination for which he had hired him, went by a circuitous and much longer way, stopping on the trip for twenty hours, leaving the animal without food or water, by reason of which neglect, coupled with overdriving, he died, it was held that the infant was liable in trover or conversion for the value of the horse, and that his contract of bailment was no defense.⁴ If the infant in similar cases wilfully injures the animal, an action will lie therefor, as such an act is not legitimately within the scope of the contract of bailment.⁵ In actions for torts of this kind the declaration must be in tort for the unlawful act, not upon a breach of the contract of bailment; for, if the remedy be sought upon the theory of a breach of the contract, the infancy would be a defense; whereas, if the contract be ignored, and the injury itself is relied upon, infancy will not shield the wrong-doer.⁶

the fact that he may agree to be bound for that which the law fastens upon him is entirely consistent with the theory of the protection which the law throws around the infant to prevent injustice and imposition.

¹ Jennings v. Rundall, 8 T. R. 335; Homer v. Thwing, 3 Pick. (Mass.) 492.

² Freeman v. Boland, 14 R. I. 39;

Green v. Sperry, 16 Vt. 390; Towne v. Wiley, 23 Vt. 355; Campbell v. Stakes, 2 Wend. 137; Fish v. Ferris, 5 Duer, 49; Vasse v. Smith, 6 Cranch, 226.

³ Freeman v. Boland, 14 R. I. 39.

⁴ Towne v. Wiley, 23 Vt. 355.

⁵ Campbell v. Stakes, 2 Wend. 137.

⁶ Fish v. Ferris, 5 Duer, 49; Freeman v. Boland, 14 R. I. 39.

§ 726. **Torts — Seduction.**— The plea of infancy is not available in an action against an infant for seduction. For, while the defendant may have been an infant when the wrong was committed, yet seduction is not in any way connected with a contract, but comes within the class of actions *ex delicto*, and may be maintained though the act was committed and the injury resulted during the minority of the wrong-doer. A person is liable, therefore, for seduction just as though he were grown when the act was committed, and an infant must respond for every element of damages for which an adult is required to answer.¹

§ 727. **Responsibility of infants for crimes — Disposing of incumbered property.**— In many of the states it is a violation of the law to dispose of or to remove property upon which there exists a mortgage or other lien. But these laws have no dominion over an infant. Only the adult is amenable to them. The infant cannot dispose of property upon which he has executed a mortgage, or otherwise incumbered, without repudiating the agreement itself. And it necessarily follows that the instant he disposes of the property incumbered he has renounced his contract, for the act of disposition is inconsistent with the purpose to abide by the previous contract of incumbrance, and the latter becomes void. In other words, there is no incumbrance when the property is disposed of, and until it is disposed of there is no crime.²

§ 728. **Capacity of infants to commit crime.**— By the common law infants under the age at which they may properly and intelligently determine between right and wrong are not capable of committing a crime, nor are they amenable to the law for an act which, in one of mature years, would be punishable. Anciently an infant under twelve years was supposed to be incapable of committing any crime. Between twelve and fourteen was the doubtful period, when the presumption against guilt in a criminal sense repelled the notion of criminal responsibility. After fourteen the infant was presumed to

¹ Lee v. Hefley, 21 Ind. 98; Fry v. State v. Howard, 88 N. C. 650; Jones Leslie, 87 Va. 269, 12 S. E. Rep. 671. v. State, 31 Tex. Cr. Rep. 252, 20 S. W.

² State v. Plaisted, 43 N. H. 413; Rep. 578.

have arrived at such a state of maturity as to understand the nature and moral, as well as legal, consequences of a criminal act. "By the law as it now stands," says Blackstone, "and has stood ever since the time of Edward the Third, the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding."¹ But while different infants may develop the understanding at different ages, yet the general common-law rule is, where the infant is over fourteen he is presumed to be capable of committing a crime, while if he is under that age the presumption is the other way, though the presumption in either case may be overcome by affirmative proof the one way or the other.² And this is true though the crime charged be rape.³ But if the infant is not over seven years, the law regards him as incapable of committing a felony.⁴ Over this age, however, though the infant be under fourteen, he may be found guilty of a capital offense, where it is affirmatively shown that he has sufficient judgment and understanding to comprehend the nature, gravity and consequences, legal and moral, of his act.⁵ An infant between the ages of seven and fourteen may be convicted of a crime upon his own confession if the *corpus delicti* be otherwise made to appear affirmatively, and this is true though the crime be of as high grade as murder or other felony.⁶ And when the juvenile offender is over seven and under fourteen years of age, the question of his capacity to

¹ 4 Bl. Comm. 23; State v. Yeargan, 117 N. C. 706, 23 S. E. Rep. 153; McCormick v. State, 102 Ala. 156, 15 S. Rep. 438; State v. Nickleson, 45 La. Ann. 1172, 14 S. Rep. 134. And see 1 Hale, P. C. 27.

² Williams v. State, 14 Ohio, 222; State v. Jones, 89 La. Ann. 935, 3 S. Rep. 57; 1 Hale, P. C. 26; Commonwealth v. M'Keagy, 1 Ashm. (Pa.) 248; Bartley v. People, 156 Ill. 234, 40 N. E. Rep. 853; McCormick v. State, 102 Ala. 156, 15 S. Rep. 438; Carr v. State, 24 Tex. App. 562, 7 S. W. Rep. 328; State v. Nickleson, 45 La. Ann. 1172, 14 S. Rep. 134; Joslin v. State (Miss.), 23 S. Rep. 515.

³ Williams v. State, 14 Ohio, 222.

⁴ 4 Bl. Comm. 23; 1 Hale, P. C. 26.

⁵ Commonwealth v. McKeagy, 1 Ashm. (Pa.) 248; 4 Bl. Comm. 23; Commonwealth v. Green, 2 Pick. (Mass.) 380; State v. Goin, 9 Humph. (Tenn.) 175; 1 Hale, P. C. 26, 27; Keith v. State, 33 Tex. Cr. Rep. 341, 26 S. W. Rep. 412; Carr v. State, 24 Tex. App. 562, 7 S. W. Rep. 328; State v. Tice (Mo.), 2 S. W. Rep. 269. And see State v. Kluseman, 53 Minn. 541, 55 N. W. Rep. 740; Allen v. State (Tex. Cr. Rep.), 37 S. W. Rep. 757.

⁶ Martin v. State, 90 Ala. 602, 8 S. Rep. 858; Commonwealth v. Smith, 119 Mass. 305; State v. Guild, 10 N. J. Law, 163; Godfrey v. State, 31 Ala. 323.

commit crime becomes one of fact.¹ The burden of proving this, however, is on the state.² The criminal responsibility of infants for their acts is now usually regulated by statutes. They vary more or less from the recognized common-law rule, yet seem all the while to have that precedent in view as a kind of general guide. These statutes frequently fix the age at which an infant of tender years is conclusively or otherwise presumed to be capable or incapable of committing a crime, and in so doing they of course supplant the common-law rule to the extent that it is thereby necessarily changed. The prudent practitioner will consult the statutes of his own state on this subject in connection with the common-law principles, and by so doing will no doubt arrive at a correct solution of almost any question of this nature which might ordinarily arise.

§ 729. Purchase of real estate from infants — Silence — Ratification.— There is a respectable line of authorities which hold that if an infant fails for an unreasonable length of time after coming of age to repudiate a contract for the sale of land, where his vendee has been placed in possession, it will amount to a ratification, or will at least cut off the right of the infant to repudiate his agreement.³ Really, however, there will generally be found something more than mere silence in these cases. Such, for instance, as the retention, after majority, of the purchase-money, in whole or in part, without tendering it back, or looking on or having knowledge of the placing by the vendee of valuable improvements on the land purchased without complaint or giving notice of an intention to repudiate, by reason of which and similar acts the vendee is lulled into a sense of security and is tacitly led to a thing which, but for the presumption that the infant would stand by his contract, would not have been done. It is contrary to the policy of the law for an infant to thus profit by an act which he should not be guilty of, and the doctrine is strictly carried out in equity. In cases of this kind, where there is merely delay on the part of the in-

¹ *Martin v. State*, 90 Ala. 602, 8 S. Rep. 858; *McCormick v. State*, 102 Ala. 156, 15 S. Rep. 438; *State v. Milholland*, 89 Iowa, 5, 56 N. W. Rep. 403.

² *Ford v. State* (Ga.), 25 S. E. Rep. 845.

³ *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. Rep. 283; *O'Brien v. Goslin*, 20 Neb. 374, 31 N. W. Rep. 274; *Ward v. Laferty*, 19 Neb. 429, 27 N. W. Rep. 393.

fant in asserting his rights, the question whether the delay is unreasonable or not is one of law.¹

§ 730. Contracts of infants — Right to rescind — Third persons.—The right of an infant to disaffirm his contract does not depend upon the right of third persons, though they may become interested in the subject-matter for a valuable consideration *bona fide* and without notice.² Where an infant, therefore, sells property to another, who sells it to a stranger in good faith, the infant may tender the price paid, if he has it, to the vendee, and at once proceed to recover the same from the third party; for, by his repudiation of his voidable contract, the title to the property at once becomes re-vested in himself, regardless of strangers and others.³

§ 731. Contracts of infants — How avoided.—An infant may avoid his contracts by any acts or conduct which clearly evinces his purpose not to be bound thereby. Any conduct or act on his part which is connected with, or has reference to, the transaction, and is inconsistent with an intention on the part of the infant to recognize the binding force of the agreement, will be sufficient to avoid it. It need not be express, but may be implied from circumstances, words or conduct.⁴ If the infant should die before attaining his majority, his administrator or legal representatives may repudiate his contracts where he could have done so himself had he lived.⁵ Where an infant conveys real property, and after arriving at full age sues for it in ejectment or otherwise, this will amount to a complete and effective repudiation of the contract of sale.⁶ And he may

¹ Goodnow v. Empire Lumber Co., 81 Minn. 468, 18 N. W. Rep. 283.

² Downing v. Stone, 47 Mo. App. 144.

³ Downing v. Stone, 47 Mo. App. 144.

⁴ State v. Plaisted, 43 N. H. 413; Edgerly v. Shaw, 5 Foster (N. H.), 514; Englebert v. Troxell, 40 Neb. 195, 58 N. W. Rep. 822; Scott v. Brown, 106 Ala. 604, 17 S. Rep. 731; McCarthy v. Nicrosi, 72 Ala. 332; Watson v. Billings, 38 Ark. 278; Houston v. Houston (Tex.), 18 S. W. Rep. 688; Manufacturing Co. v. Lamb, 81 Mo. 221; Drake v. Ramsay, 5 Ohio, 251; Tun-

son v. Chamberlin, 88 Ill. 378; McCarthy v. Woodstock Iron Co., 92 Ala. 463, 8 S. Rep. 417; Stotts v. Leonhard, 40 Mo. App. 336; Ellis v. Alford (Miss.), 1 S. Rep. 155.

⁵ Vaughn v. Parr, 20 Ark. 600; Young v. Gammel, 4 Iowa, 207.

⁶ Craig v. Van Bebbler, 100 Mo. 584, 18 S. W. Rep. 906; Doe v. Abernathy, 7 Blackf. (Ind.) 442; Hubbard v. Cummings, 1 Greenl. (Me.) 10; Cresinger v. Welch, 15 Ohio, 156; Bagley v. Fletcher, 44 Ark. 153.

bring ejectment for land conveyed during infancy without giving notice of the action or his intention to disaffirm.¹ So where real property is conveyed by the infant, a tender of a deed back upon arriving at majority will be a sufficient repudiation of the conveyance.² And an infant wife who joins in a deed by her husband for the purpose of relinquishing her dower or other estate in the land conveyed may renounce such action on her part upon arriving at majority.³ A contract of an infant may be avoided during coverture.⁴ The infant *feme covert* is entitled, on common-law principles, to a reasonable time after her disability of coverture is removed, and need not assert her right of disaffirmance earlier, though she sooner arrive at majority.⁵ An infant may avoid his deed to real estate upon attaining his majority, and no act on his part during infancy is necessary to enable him to assert this privilege on coming of age.⁶ A written notice of his election to disaffirm will amply serve the purpose, and entitle him to a decree in equity canceling the instrument.⁷ The deed of an infant may be repudiated in any way that indicates clearly the intention of the grantor not to be bound thereby. It is effectively accomplished when the infant, after arriving at maturity, conveys the same land to another, for this indicates beyond peradventure that the grown infant has elected to treat the conveyance executed in infancy as void and of no force. Both deeds cannot stand, and the law gives vitality to the last in such cases, and by the execution of the later one the former deed is canceled and made null.⁸ If an infant executes a release of a cause of action, and, upon arriving

¹ Clark v. Tate, 7 Mont. 171, 14 Pac. Rep. 761.

² Morris v. Holland, 10 Tex. Civ. App. 474, 31 S. W. Rep. 690.

³ Bradshaw v. Van Valkenburg, 97 Tenn. 316, 37 S. W. Rep. 88; Stull v. Harris, 51 Ark. 294, 11 S. W. Rep. 104.

⁴ Fox v. Drewry, 62 Ark. 316, 35 S. W. Rep. 533; Stull v. Harris, 51 Ark. 294, 11 S. W. Rep. 104; Harrod v. Myers, 21 Ark. 592; Bull v. Sevier, 88 Ky. 515, 11 S. W. Rep. 506.

⁵ Sims v. Everhardt, 102 U. S. 300.

⁶ Phillipps v. Green, 3 A. K. Marsh. (Ky.) 7; McCarthy v. Nicrosi, 72 Ala. 332.

⁷ McCarthy v. Woodstock Iron Co., 92 Ala. 463, 8 S. Rep. 417.

⁸ Harris v. Cannon, 6 Ga. 382; McGan v. Marshal, 7 Humph. (Tenn.) 121; Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. Rep. 538; Jackson v. Carpenter, 11 Johns. 539; Lessee of Tucker v. Moreland, 3 Pet. 58; Eagle Fire Co. v. Lent, 6 Paige Ch. 635; Cressinger v. Lessee of Welsh, 15 Ohio, 156; Den v. Stowe, 2 Dev. & Bat. 320; Haynes v. Bennett, 53 Mich. 15, 18 N. W. Rep. 539; Dawson v. Helms, 30 Minn. 107, 14 N. W. Rep. 462; Corbett v. Spencer, 63 Mich. 731, 30 N. W. Rep. 385; Vallandingham.

at majority, sues to recover under the original right, this will amount to a repudiation of the release, and entitle him to assert any rights he might have asserted but for the execution, during infancy, of the release.¹

§ 732. Contracts of infants — Presumptions of ratification or validity.—As the law rather favors the infant who is deemed too immature to prudently and intelligently bind himself or his estate, it is necessary, in order to establish a liability, that positive evidence of a ratification be adduced. No presumptions will be indulged in aid of a claim against an infant on contract. It is not sufficient, therefore, to charge an infant with liability on a contract after he becomes of age that he had made many others and ratified them. Ratifying one agreement is not ratifying another, and the law will not presume that, because an infant ratifies one act of infancy after becoming of age, he intends to, or does, ratify all or any others.²

§ 733. Contracts of infants — Must be avoided in whole or not at all.—While the law gives an infant the right to repudiate his contract when coming of age, yet, in order to avail himself of this advantage, he must renounce the whole contract. If it be divisible he may not elect to take the part which he may deem to his advantage and ignore the other. The party dealing with the infant has the right to require this of the infant, and if the latter refuses to entirely renounce the agreement, when it is inseparable, the performance of the whole of it may be required of him.³

§ 734. Contracts of infants — What is not a ratification.—Nothing short of an affirmative act on the part of the infant after arriving at majority will amount to a tacit or express ratification of a contract made during infancy. Though an infant, upon coming of age, promises to pay a debt made while a minor, provided he can conveniently do so, but stating no

v. Johnson, 85 Ky. 288, 3 S. W. Rep. 173; Peterson v. Laik, 24 Mo. 544; Eureka Co. v. Edwards, 71 Ala. 248.

¹St. Louis, I. M. & S. Ry. Co. v. Higgins, 44 Ark. 293.

²Curtin v. Patten, 11 S. & R. (Pa.) 350; Oliver v. McClellan, 21 Ala. 675.

³Morril v. Aden, 19 Vt. 505; Lynde v. Budd, 2 Paige Ch. 191. See also State v. Binder, 57 N. J. Law, 374, 31 Atl. Rep. 215.

time of payment and not expressly agreeing to pay it unconditionally, he will not be liable on such agreement.¹ The ratification must be express, voluntary, and with a full knowledge and understanding that the infant is not bound in law to meet the agreement unless he voluntarily so elects to do unequivocally.² A part payment on a note, executed during minority, after attaining majority will not amount to a ratification of the whole debt, and a promise to pay, in order to have this effect, must be made with reference to the original undertaking, and with a view of adopting it as valid and binding, and the promise must be unconditional and clear.³ So a simple admission on the part of the infant, when he arrives at majority, that he owes the debt, without any express promise to pay, is not enough.⁴ And a new promise made after an action on the demand is begun is not enough, for the right to recover must stand on the status of the cause at the time the action is brought, not upon a subsequent or changed condition of things.⁵ A submission of an issue or dispute of indebtedness after arriving at age does not amount to a ratification of a contract made during infancy or an agreement without reserve to pay.⁶ The mere acknowledgment of the execution of a note does not amount to a ratification nor an agreement to pay it.⁷ In short, before an infant will be deemed in law to have ratified his contract made while under disability, it must affirmatively appear that there was an express promise after he became of age, or such acts as would have been equivalent to a new contract.⁸

¹ Bresee v. Stanley, 119 N. C. 278, 25 S. E. Rep. 870.

² Alexander v. Hutcheson, 2 Hawks (N. C.), 535.

³ Robbins v. Eaton, 10 N. H. 561; Thrupp v. Fielder, 2 Esp. 628; Ford v. Phillips, 1 Pick. (Mass.) 202; Hale v. Gerrish, 8 N. H. 374; Smith v. Mayo, 9 Mass. 62; Goodsell v. Myers, 3 Wend. 479; Tyler v. Estate of Gallop, 68 Mich. 185, 35 N. W. Rep. 902; Rapid Transit Co. v. Sanford (Tex. Civ. App.), 24 S. W. Rep. 587; Flexner v. Dickerson, 71 Ala. 318.

⁴ Ford v. Phillips, 1 Pick. (Mass.) 202; Robbins v. Eaton, 10 N. H. 561;

Thompson v. Lay, 4 Pick. (Mass.) 48; Benham v. Bishop, 9 Conn. 330.

⁵ Ford v. Phillips, 1 Pick. (Mass.) 202; Hale v. Gerrish, 8 N. H. 374; Meriman v. Wilkins, 6 N. H. 432; Thornton v. Illingworth, 2 Barn. & Cr. 824.

⁶ Benham v. Bishop, 9 Conn. 330.

⁷ Benham v. Bishop, 9 Conn. 330.

⁸ Tyler v. Fleming, 68 Mich. 185, 35 N. W. Rep. 902; Wilcox v. Roath, 12 Conn. 550; Minock v. Shortridge, 21 Mich. 304; Fetrow v. Wiseman, 40 Ind. 148; Goodsell v. Myers, 3 Wend. 479; Tucker v. Moreland, 10 Pet. 58; Stone v. Ellis, 69 Tex. 325, 7 S. W. Rep. 349; Proctor v. Sears, 4 Allen (Mass.), 95.

And the mere admission or acknowledgment by the infant that he owes the debt is not sufficient.¹

§ 735. Contracts of infants must be repudiated within a reasonable time after attaining majority.— While an infant may ordinarily renounce his contracts during infancy or wait until he is of age, and while he still has a reasonable time after arriving at age within which to make his election whether he will affirm or renounce his acts or contracts of infancy, yet he cannot wait an unreasonable time, but must make the election seasonably, to the end that those who have dealt with him may not be subjected to an injustice. And if he fails to make the election within such reasonable time, the law will interpose a ratification, to the end that the disability of infancy be not made a sword of injustice instead of a shield of protection.² The privies and legal representatives of an infant are bound by this rule of law, the same as is the infant.³

§ 736. Right to repudiate contract — Infant may wait until he arrives at full age.— While an infant may renounce his agreements for articles not necessities entered into during minority before he reaches full age, yet he is not compelled to do so. His very infancy and the attendant immaturity of judgment incident to this age are a sufficient reason for permitting him to wait until he reaches his majority before he will be required in law to make his election whether he will abide by his agreement or repudiate it, and require the person dealing with him to place him *in statu quo*.⁴

¹Smith v. Mayo, 9 Mass. 64; Boyden v. Boyden, 9 Metc. (Mass.) 519; Smith v. Kelley, 13 Metc. (Mass.) 309.

²Baker v. Kennett, 54 Mo. 82; Jenkins v. Jenkins, 12 Iowa, 195; Boyden v. Boyden, 9 Metc. (Mass.) 519; Kline v. Beebe, 6 Conn. 494; Green v. Wilding, 59 Iowa, 679, 13 N. W. Rep. 761; Leacox v. Griffith, 76 Iowa, 89, 40 N. W. Rep. 109; Ferguson v. Houston, E. & W. T. Ry. Co., 73 Tex. 346, 11 S. W. Rep. 347; Sims v. Bardoner, 86 Ind. 87; Richardson v. Pate, 93 Ind. 423; Stringer v. Insurance Co., 82 Ind. 100; McClanahan v. Williams, 136

Ind. 30, 35 N. E. Rep. 897; Hegler v. Faulkner, 153 U. S. 109, 14 Sup. Ct. Rep. 779; Johnson v. Storie, 32 Neb. 610, 49 N. W. Rep. 371; Eisenmeinger v. Murphy, 42 Minn. 84, 43 N. W. Rep. 784; State v. Plaisted, 43 N. H. 413; Voltz v. Voltz, 75 Ala. 555; Thomasson v. Boyd, 13 Ala. 419; Bingham v. Barley, 55 Tex. 281; Beardsley v. Holt, 96 N. Y. 201.

³Simpkins v. Searcy, 10 Tex. Civ. App. 406, 32 S. W. Rep. 849.

⁴Englebert v. Troxell, 40 Neb. 195, 58 N. W. Rep. 852.

§ 737. Contracts of infants — Repudiation — Reasonable time — What is.—The question what is a reasonable time within which an infant must repudiate his contract or be deemed to have forfeited the right to do so is one not always of easy solution. It may and frequently will depend upon many circumstances and the facts and surroundings of each case. This being true, it is usually to be determined as a question of fact, taking into consideration all the facts and circumstances.¹ Sometimes the time within which an infant may avoid his contracts after attaining majority is fixed by statute; and when this is the case the statute will serve as a certain and safe rule by which to determine what is a reasonable time. It makes the time certain, definite and conclusive, and serves to obviate some necessary confusion and difficulty in ascertaining a question which, without the statutory guide, might be decided one way by one jury or court and another by another. But in the absence of statute an infant must assert his right of disaffirmance within the time that he would not be barred by the statute of limitations. Where, therefore, an infant sells another land and his vendee goes into possession under the conveyance and claiming ownership by reason thereof, the infant must renounce the sale before the time at which the possession thus given the vendee would ripen into a title by prescription.² And if in such case the statute of limitations should begin to run against the infant in his life-time, he having attained majority before his death, it will continue running against his executors or other legal representatives.³ These stand in no more favorable light than the infant whom they represent, and are entitled in their representative capacity only to the rights and privileges which would have been allowed the infant had he lived.

¹ Englebert v. Troxell, 40 Neb. 195, 58 N. W. Rep. 852; Searcy v. Hunter, 81 Tex. 646, 17 S. W. Rep. 372; Simpkins v. Searcy, 10 Tex. Civ. App. 406, 32 S. W. Rep. 849; Tyler v. Fleming, 68 Mich. 185, 35 N. W. Rep. 902; Jenkins v. Jenkins, 12 Iowa, 195; Green v. Wilding, 59 Iowa, 679, 18 N. W. Rep. 761; Hegler v. Faulkner, 153

U. S. 109, 14 Sup. Ct. Rep. 779; Heatt v. Dixon (Tex. Civ. App.), 26 S. W. Rep. 263; State v. Plaisted, 43 N. H. 413.

² Bozeman v. Browning, 31 Ark. 364; Kounts v. Davis, 34 Ark. 590.

³ Bozeman v. Browning, 31 Ark. 364.

§ 738. **Contracts — Disaffirmance — Instances of reasonable time.**— As there is no fixed time within which an infant may, upon attaining majority, repudiate a contract he has made during infancy, three months is reasonable.¹ And so are thirty-two days.² Five months is not unreasonable.³ Nor is six months.⁴ A repudiation made in a year and a half has been held to be in apt time.⁵ Three years has also been held a reasonable time.⁶ And when coverture supervenes before infancy ceases, an infant *feme covert* may have until a reasonable time after both the disabilities of coverture and infancy are removed within which to repudiate her contracts made while an infant, though the coverture extend to a much longer time than the arrival at majority.⁷ But this rule of law does not preclude the *feme covert* from disaffirming her contracts during coverture.⁸

§ 739. **Deed of infant — Repudiation — Time of.**— While an infant may repudiate his ordinary contracts during infancy as well and effectively as after attaining his majority, yet there seems to be an exception in the case of a deed or other conveyance affecting his real estate. These, ordinarily, cannot be avoided during minority.⁹ And in case the infant be a *feme covert* when the deed is executed, she may wait until both the disabilities of infancy and coverture are removed before asserting her right to repudiate the transaction.¹⁰ If, however, the infant do not marry until after attaining her majority, the subsequent coverture would not serve the purpose of prolonging the time within which the deed made during infancy might

¹ Scott v. Scott, 29 S. C. 417, 7 S. E. Rep. 811.

² Leacox v. Griffith, 76 Iowa, 89, 40 N. W. Rep. 109.

³ Searcy v. Hunter, 81 Tex. 646, 40 N. W. Rep. 109.

⁴ Cardwell v. Rogers, 76 Tex. 37, 12 S. W. Rep. 1006; Rundle v. Spencer, 87 Mich. 189, 34 N. W. Rep. 549.

⁵ Johnson v. Storie, 32 Neb. 610, 49 N. W. Rep. 371.

⁶ Mette v. Feltgen (Ill.), 27 N. E. Rep. 911; Mette v. Feltgen, 148 Ill. 357, 49 N. W. Rep. 371.

⁷ Dodd v. Benthal, 4 Heisk. (Tenn.) 609; Scott v. Buchanan, 11 Humph. (Tenn.) 467; Walton v. Gaines, 94 Tenn. 420, 29 S. W. Rep. 458; McClanahan v. Williams, 136 Ind. 30, 35 N. E. Rep. 837.

⁸ Smith v. Lucas, 18 Ch. Div. 531; Wilder v. Pigot, 22 Ch. Div. 263.

⁹ McCormick v. Leggett, 8 Jones (N. C. Law), 425; Roof v. Stafford, 7 Cowen, 179.

¹⁰ Wilson v. Branch, 77 Va. 65; Darragh's Adm'r v. Blackford, 84 Va. 509, 5 S. E. Rep. 542.

be renounced. And the right of an infant to rescind his conveyance of realty does not depend upon the title thereto remaining in his grantor until he becomes *sui juris*. He may assert it as effectively after his grantor has conveyed the land to another, though an innocent stranger buying from the grantee in good faith and paying full value, as though no transfer or conveyance had been made or attempted by his grantee, as the rights of an infant and the necessity for the protection of the law does not depend upon the knowledge of the age of the infant by others.¹

§ 740. Contracts of infants — Disaffirmance — Instances of unreasonable time.— The courts in struggling to arrive at a proper solution of the question, What is a reasonable time within which an infant may repudiate his contract on coming of full age? have been far from harmonious. Some have held a certain period unreasonable, while others have held a like period reasonable. It has been held that four months is an unreasonable time to wait after arriving at majority to repudiate a contract.² Likewise, three and a half months.³ Six months, too, has been held an unreasonable time to wait before asserting the right of repudiation.⁴ And one year has been held too long.⁵ And, in harmony with these rulings, a period of three years has, of course, been held to be too long.⁶ There is usually good reason in holding an infant barred of the right of repudiation in three years from the time of attaining his majority. When the period is fixed by statute, it is rarely that a longer time is allowed for this purpose, and often only one year is permitted, which seems to be a very reasonable time for the infant, and necessary for the proper protection of those who have dealt with him during minority.

§ 741. Contracts of infants may be repudiated before attaining majority.— The contract of an infant being, gener-

¹ *Searcy v. Hunter*, 81 Tex. 646, 17 S. W. Rep. 372.

² *Rapid Transit Co. v. Sanford* (Tex. Civ. App.), 24 S. W. Rep. 587.

³ *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. Rep. 1089.

⁴ *Jones v. Jones*, 46 Iowa, 466;

Hoover v. Kinsey Plow Co., 55 Iowa, 668, 8 N. W. Rep. 150.

⁵ *Eisenmeinger v. Murphy*, 42 Minn. 84, 43 N. W. Rep. 784.

⁶ *Green v. Wilding*, 59 Iowa, 679; 13 N. W. Rep. 761; *Ward v. Lafferty*, 19 Neb. 429, 27 N. W. Rep. 393. The time in this last case was three years.

ally speaking, voidable, and subject to repudiation or ratification, it follows, of course, that the infant may do either on arriving at majority, for then he can bind himself as effectively as he ever can, no matter how long he lives. But he need not wait until he reaches his majority to exercise the option of repudiation, though, of course, he could not ratify his contract before attaining majority. As to repudiation, he has the same right and power during infancy to renounce a contract that he has to make a voidable one. He may therefore renounce his ordinary contracts of infancy during the period of minority as well and to the same effect as after attaining full age.¹ This rule of law is a wholesome one, for it is proper that an infant, who may repudiate his contract, be permitted to do so at the earliest possible moment, for the person with whom he deals will the sooner know what he may depend upon, and might be injured by a delay of several years, or even less, before an election to repudiate. But however injurious the delay intervening before arrival at majority may be to the adult, the infant, of course, may wait until then to make his election whether he will repudiate.

§ 742. Contracts of infants — Sureties — Effect of disaffirmance.— If an infant executes an obligation for something for which he cannot in law irrevocably bind himself, and a surety signs it with him, the latter will not be liable if the infant, upon arriving at age or otherwise in apt time, repudiate it.² The reason of this is, the surety merely undertakes to perform a legal obligation if his principal does not do so. But when the principal elects to repudiate his agreement, it becomes at once a nullity and ceases to have any existence or force; and as the obligation has upon the repudiation no binding effect, it follows logically that the surety cannot then be compelled to pay.

¹ *Stafford v. Roof*, 7 Cowen, 626; *P. Ry. Co.*, 42 W. Va. 112, 24 S. E. Rep. 615; *Adams v. Beall*, 76 Md. 53, 8 Atl. Rep. 664; *Shipman v. Horton*, 17 Conn. 481; *Petrie v. Williams*, 68 Hun, 589, 23 N. Y. S. 237; *Bloomington v. Chittenden*, 75 Mich. 305, 42 N. W. Rep. 766; *Robinson v. Weeks*, 56 Me. 102.
² *Baker v. Kennett*, 54 Mo. 84.

§ 743. Cannot ratify contracts until they arrive at majority.— An infant cannot ratify his contract made before arriving at age so as to bind himself or privies. This option cannot be exercised until he has arrived at the age at which he may exercise it. A ratification made before attaining majority is an absolute nullity and will neither serve to make the contract more binding nor preclude a repudiation when full age is attained.¹ But when the act or contract of an infant is properly ratified after coming of age, the ratification relates back to the time of making the agreement and renders it effective from then.² And the fact that the adult child does not know or comprehend the legal effect of his act of ratification makes no difference. Being of full age, he is charged with knowledge of what the law is, and its effect upon his acts and conduct, and is bound and precluded accordingly.³

§ 744. Liability on contract for torts.— If an infant is guilty of a tort or wrong of any kind whereby another is injured, and in satisfaction and settlement thereof executes his note or other agreement to the party injured for the amount of the injury sustained, this contract will bind the infant and may be enforced if the amount agreed to be paid be reasonable and proper. He is, in such cases, already liable at law for the damage, and the fact that the amount recoverable is evidenced by his obligation does not detract from his legal liability on the one hand, or deprive him of any protection the law affords him on the other. He will not be heard, therefore, to plead his infancy in bar of an action upon such an obligation, though he may have been under age at the time of the transaction as well as when he made the contract.⁴ And an action may be maintained by an infant, as soon as he attains his majority, for money embezzled by him during infancy, for this is a crime and a wrong, and it is against the policy of the law to allow even an infant to profit by his own culpable wrong.⁵ Upon the

¹ *Corey v. Burton*, 32 Mich. 30; *Cox v. McGowan*, 116 N. C. 131, 21 S. E. Rep. 108.
² *Zouch v. Parsons*, 3 Burr. 1794; *Montgomery v. Erwin*, 24 Ark. 540; *Shipley v. Bunn*, 125 Mo. 445, 28 S. W. Rep. 754; *Autland v. Vance* (Ky.), 34 S. W. Rep. 22.
³ *American Mortgage Co. v. Wright*, 101 Ala. 658, 14 S. Rep. 399.
⁴ *Ray v. Tubbs*, 50 Vt. 688.
⁵ *Bristow v. Eastman*, 1 Peake, N. P. 223.

² *Minock v. Shortridge*, 21 Mich. 304; P. 223.

same principle he is liable for money or property of any kind which he tortiously or otherwise takes from the owner, or from others holding in right of the owner.¹ The infant, in other words, has little favor in law with respect to his torts, where he is of sufficient age and intelligence to comprehend the wrongfulness of his act.

§ 745. Contracts of infants—Effect of ignorance of age on the part of persons dealing with minors.—The disabilities of infancy are not to be displaced by the ignorance of the parties who deal with them as to their age. Those thus dealing with an infant cannot deprive him of his right to disaffirm his contract made during infancy by a plea of their ignorance in this respect. They must ascertain, at their peril, with whom they are dealing, and whether or not he has legal capacity to enter into a contract.² This is certainly a correct proposition of law. Adults who attempt to deal with infants must do so at arm's length. If either must be injured thereby, it is deemed better that the more mature be, rather than the supposed weaker of the two. It would be just as reasonable to contend that a lunatic or idiot would be bound by his contract with another because his disability was not known. It makes no difference that the infant appear to be *sui juris*. The disability and incident protection afforded do not depend upon his appearance, but rather his age. This is the cardinal inquiry, and though the person dealing with the infant conscientiously believe him to be grown, he must suffer for his ignorance.³

§ 746. Bailment — Conversion by infants.—If an infant gets possession of property for a certain purpose and appropriates it to another and different purpose, or does any act whereby the purpose of hire is disregarded, he will be liable for a conversion of the property thus diverted from the purpose for which it was engaged.⁴ Where, therefore, an infant hires a horse to go to a certain place, but, disregarding the terms of

¹ Ewell v. Martin, 32 Vt. 217; Shaw v. Coffin, 58 Me. 254. *contra*, Dillon v. Burnham, 43 Kan. 77, 22 Pac. Rep. 1016.

² Brantley v. Wolf, 60 Miss. 420; Stack v. Cavanaugh (N. H.), 80 Atl. Rep. 350; Sewell v. Sewell, 92 Ky. 500, 18 S. W. Rep. 162. ³ Sewell v. Sewell, 92 Ky. 500, 18 S. W. Rep. 162.

⁴ Ray v. Tubbs, 50 Vt. 688. See, apparently

bailment, goes to another instead, he will be guilty of conversion of the animal at common law, and liable in tort for its value to the owner.¹ The same rule governs where an infant hires a horse to go to a definite place, and, the animal becoming sick, he returns it and gets another, intending secretly, with the horse gotten in exchange, to go to another place, which he does. This will be a conversion of the second horse, and he will be liable accordingly.² If an infant hires an animal as a bailee and so mistreats it that it dies or is destroyed, he will be liable for its value. But the mistreatment must be gross, as he is not liable if death or destruction should ensue without a want of ordinary care on his part.³ So, too, an infant is not liable to the owner of a horse from whom he had hired the same for a certain journey because of a mere failure to drive as skilfully as an adult would ordinarily do; for the bailor must contemplate the indiscretion of an infant which is ordinarily incident to immature years.⁴

§ 747. Liability of infants for fraudulent acts.—An infant will be held liable to any one injured by reason of his fraudulent acts or practices. This is in the nature of a wrong, and the law will no more permit him to profit by his fraud than by a tort or wrong. The policy of the law in protecting infants is to shield them from possible or actual imposition. But this policy does not extend to either encouraging or sanctioning their fraudulent acts or conduct whereby they effect an injury to another.⁵ So, where an infant procured the possession of property by means of a contract, but with the fraudulent purpose and intent preconceived not to redeliver it, he will be liable in tort upon a refusal to surrender it upon proper demand when the right of possession ceases in him.⁶ The same rule would apply were the fraudulent act done by an adult for and on behalf of the infant.⁷ But an adult cannot in any case

¹ Woodman v. Hubbard, 25 N. H. 67, 73.

² Ray v. Tubbs, 50 Vt. 688.

³ Eaton v. Hill, 50 N. H. 235.

⁴ Eaton v. Hill, 50 N. H. 235.

⁵ Walker v. Davis, 1 Gray (Mass.), 506; Bristow v. Eastman, 1 Esp. 172; Lytle v. State, 17 Ark. 608, 640; 2

Kent, Comm. 240; Watson v. Billings, 38 Ark. 278, 281; Fitts v. Hall, 9 N. H. 441; Cadwallader v. McClay, 37 Neb. 359, 58 N. W. Rep. 1054; Nash v. Jewett, 61 Vt. 501, 18 Atl. Rep. 47.

⁶ Walker v. Davis, 1 Gray (Mass.), 506; Mathews v. Cowan, 59 Ill. 341.

⁷ Worthen v. Ratcliffe, 38 Ark. 330.

set up an estoppel to bar the infant of the right to rescind a contract by reason of the disability of infancy, simply because the infant failed to make his age known, the party dealing with him making no inquiry to ascertain the age.¹ Every person deals with an infant at arm's length, at his own risk, and with a party for whom the law has a jealous watchfulness.² And an infant cannot in any case be chargeable with fraud, whether in law or in equity, unless he has arrived at an age of discretion and judgment. No one has the right to rely on the assurance of an infant who is so young as not to be able to fairly comprehend the nature and consequences of his acts or representations.³

§ 748. Estoppel — Fraud.— While an infant is not, generally speaking, estopped by his act or conduct, yet there are cases in which he is held to be bound. These instances are where he obtains something of value by a false and fraudulent representation of a material fact of which he is cognizant and his victim ignorant, whereby another is induced, believing and relying on his statements, and having a right to so believe, to part with property of any kind. In cases of this kind the infant is not permitted to plead his disability in bar of any right which might be asserted by his defrauded victim. This species of estoppel is rather based on the law of fraud than estoppel proper. For it is the fraudulent act of the infant which precludes him from evading the law of estoppel to the injury of another.⁴ But this rule seems to be applicable only in courts of equity, not of law.⁵ In equity all the circumstances of the

¹ *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. Rep. 1089.

² *Chandler v. Simmons*, 97 Mass. 508; *Briggs v. McCabe*, 27 Ind. 237; *Sparr v. Florida Southern Ry. Co.*, 25 Fla. 185, 6 S. Rep. 60.

³ *Ferguson v. Bobo*, 54 Miss. 121.

⁴ *Adams v. Fite*, 3 Baxt. (Tenn.) 69; *Petterson v. Lawrence*, 90 Ill. 174; *Whittington v. Wright*, 9 Ga. 23; *Ferguson v. Bobo*, 54 Miss. 121; *Overton v. Banister*, 3 Hare, 503; *Gaunt v. Taylor*, 60 Hun, 586, 15 N. Y. S. 589; *Schmitzheimer v. Eiseman*, 7 Bush (Ky.), 298; *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. Rep. 511; *Pemberton*

B. & L. Ass'n v. Adams, 53 N. J. Eq. 258, 31 Atl. Rep. 280; *Lytle v. State*, 17 Ark. 608, 640; *Williamson v. Jones* (W. Va.), 27 S. E. Rep. 411; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. Rep. 420; *Ryan v. Grawney*, 125 Mo. 474, 28 S. W. Rep. 189. And see *Bradshaw v. Van Winkle*, 133 Ind. 134, 32 N. E. Rep. 877.

⁵ *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. Rep. 511; *Pemberton B. & L. Ass'n v. Adams*, 53 N. J. Eq. 258, 31 Atl. Rep. 280. But see *Geer v. Hovey*, 1 Root (Conn.), 179, and *Ferguson v. Bobo*, 54 Miss. 121.

transaction are scanned. The age, intelligence and surroundings of the infant are taken into consideration, as well as the character of the representations and the advantage which has redounded to the infant; and from all these, in equity, it will be determined whether the transaction was of such a nature and so calculated to mislead as to preclude the infant from taking any advantage of his disability.¹ In fact, generally speaking, the fraudulent act or representation must amount to a tort. An infant is not liable on a fraudulent contract any more than he is for a tort which grows out of contract.²

§ 749. Right of infants to hold office.—The right of an infant to hold office may depend upon local, statutory or constitutional requirements. And the cases all seem to make a marked distinction in judicial and ministerial offices. Mr. Mechem gives this rule in the following apt language: "Offices where judgment, discretion and experience are necessary to the proper discharge of the duties they impose cannot be held by infants. But where the duties to be performed are ministerial merely, requiring nothing more than skill and diligence, an infant, otherwise competent, may be the officer."³ This rule is well fortified by authority.⁴ Unless there is some inhibition of law making infants ineligible to hold an office, or the office be one connected with the administration of justice or affairs of state and calling for mature judgment and discretion, it is generally held that an infant may hold the office.⁵ In harmony with the foregoing principles, it is held that an infant cannot act as a

¹ *Clarke v. Copley*, 2 Cox (Eng. Ch.), 173; *Zouch v. Parsons*, 3 Burr. 1802; 1 Sto. Eq. Jur., § 240; *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. Rep. 511; *Ex parte Unity J.-S. Mut. Banking Ass'n*, 3 De Gex & J. 63; *Overton v. Banister*, 3 Hare, 503.

² *West v. Moore*, 14 Vt. 447; *Johnson v. Pie*, 1 Lev. 169.

³ Mechem, Pub. Officers, § 71.

⁴ *Harkreader v. State*, 35 Tex. Cr. Rep. 243, 33 S. W. Rep. 117; *Golding's Case*, 57 N. H. 146; *Shrewsbury's Case*, 9 Coke (K. B.), 48; *Tyler, Infancy*, § 78; *United States v. Bixby*, 9 Fed. Rep. 78; *Moore v. Graves*, 3 N.

H. 408; *Jamesville & W. R. R. Co. v. Fisher*, 109 N. C. 1, 13 S. E. Rep. 698; *McConnell v. Kennedy*, 29 S. C. 180, 7 S. E. Rep. 76; *State v. Toland*, 36 S. C. 515, 15 S. E. Rep. 599; *Rex v. Carter*, 1 Cowp. 220; *Claridge v. Evelyn*, 5 Barn. & Ald. 81. And see, as analogous, *Stensoff v. State*, 80 Tex. 429, 15 S. W. Rep. 1100; *Jeffries v. Harrington*, 11 Colo. 191, 17 Pac. Rep. 505; *Hull v. Reilly*, 87 Mich. 493, 49 N. W. Rep. 869.

⁵ *United States v. Bixby*, 9 Fed. Rep. 78; *Tyler, Infancy*, § 78; *Harkreader v. State*, 35 Tex. Cr. Rep. 243, 33 S. W. Rep. 117.

juror, for this duty requires discretion and judgment. The functions of a juror are judicial. Judgment must be exercised, and it is to the interest and welfare of the state that none other than those who are electors, as a rule, be eligible to jury duty, as such service directly and immediately concerns the administration of public justice.¹ And of course he could not discharge the duties of a judge of a court, for such an office calls for the exercise of judicial functions, and an infant is presumed not to possess the mature learning, discretion and ability necessary to the proper and intelligent administration of justice.² On the other hand, at common law an infant may be a notary public.³ He may be deputy county clerk, and perform the functions of such office with the same effect that his principal may, though the latter must be at least twenty-one years of age.⁴ He may act as a deputy-sheriff with like effect, though he could not hold the office of sheriff because a minor.⁵ So an infant who is specially designated by a justice of the peace to serve a warrant of arrest may do so, and his act in so doing will be lawful.⁶

§ 750. Power of infants to indorse negotiable instruments. Generally speaking, an infant has the right, authority and power to indorse a paper made payable to his order. This rule is based not so much on the ability of the infant to contract as on the theory that when one makes a bill of exchange or other like instrument, payable to the order of an infant, it is a contract to pay to whom the infant indorses, and the payor is in no attitude to say he will not pay to such order when, being *sui juris* himself, he has solemnly agreed to do so.⁷ An infant is not liable to an indorsee of a bill of exchange which he has executed for necessities properly furnished him by the payee,

¹ United States v. Bixby, 9 Fed. Rep. 78.

² Coke, Litt. 3b; Moore v. Graves, 3 N. H. 408; King v. Carter, 1 Cowp. 220; Golding's Petition, 57 N. H. 146.

³ United States v. Bixby, 9 Fed. Rep. 78.

⁴ Harkreader v. State, 35 Tex. Cr. Rep. 243, 33 S. W. Rep. 117; Young v. Fowler, Cro. (K. B.) 555.

⁵ Moore v. Graves, 3 N. H. 408;

State v. Toland, 36 S. C. 515, 15 S. E. Rep. 599; Murfree, Sheriffs, § 71; Barrett v. Seward, 22 Vt. 176; Jamesville & W. R. R. Co. v. Fisher, 109 N. C. 1, 13 S. E. Rep. 698.

⁶ McConnell v. Kennedy, 29 S. C. 180, 7 S. E. Rep. 76.

⁷ Nightengale v. Withington, 15 Mass. 272; Hastings v. Dollarhide, 24 Cal. 195.

though he would be liable to the person furnishing the necessities to the extent of the actual value thereof.¹ It has been held, however, that an infant may assign a cause of action for wages due him from his master where he is entitled to receive pay personally.² When a promissory note or other negotiable instrument is payable to the order of an infant he may indorse it to another, and the indorsee again transfer it. In such event all persons dealing with the instrument will take good title thereto, subject to be defeated only by the infant himself.³

§ 751. Effect of marriage on power of infants to contract—Right of infants to own property.—The marriage of an infant does not enable him to contract, even though he may have attained the age at which he may lawfully enter into the contract of marriage. He would thereafter be liable for necessities for both himself and wife, and for these he could of course bind himself, whereas before the marriage he would have power only to buy those necessities which he himself needed. But his marriage does not take away from him the general protection which the law gives. This is for his benefit and because he is supposed not to be mature enough to bind himself generally by contract. His marriage does not increase his intellectual acumen, nor take away the necessity for the rule, and it remains, generally speaking, until his majority is attained.⁴ Indeed, if the infant should marry before he reaches the age at which the law authorizes him to contract marriage, he may sue the adult with whom he has contracted the marriage for a dissolution on account of the disability of non-age, and the latter will not be permitted to defeat the action.⁵ A married infant cannot convey or encumber her real estate.⁶ Nor, upon the same principle, can she relinquish her right of dower in the estate of her husband.⁷ In Indiana, however, the infant wife may join with her hus-

¹ *Ex parte Margrett* (1891), 1 Q. B. 413.

² *O'Neil v. Chicago, M. & St. P. Ry. Co.*, 33 Minn. 489, 24 N. W. Rep. 192.

³ *Hastings v. Dollarhide*, 24 Cal. 195.

⁴ *Harrod v. Myers*, 21 Ark. 592; *Fox v. Drewry*, 62 Ark. 316, 35 S. W. Rep. 533; *Cronise v. Clarke*, 4 Md. Ch. 405.

⁵ *Holt v. Clarencieux*, 2 Str. 937.

⁶ *Cronise v. Clarke*, 4 Md. Ch. 405;

Harrod v. Myers, 21 Ark. 592.

⁷ *Watson v. Billings*, 38 Ark. 278;

Craig v. Van Bebber, 100 Mo. 584, 13

S. W. Rep. 906; *Bradshaw v. Van*

Valkenburg, 97 Tenn. 316, 37 S. W.

Rep. 88.

band in his deed and effectively relinquish her right of dower; but this power is expressly given by statute in this state, and applies only to cases where her husband is *sui juris*.¹ A married infant may sue in equity to cancel a conveyance made during infancy and after marriage;² though, of course, as the conveyance is merely voidable only and not void, the infant may elect to let it stand upon attaining majority.³ While an infant cannot, ordinarily, make a binding contract, yet this by no means precludes him from the right of enjoying nor the power of acquiring property. For both these may be bestowed upon him by operation of law, as by inheritance, by bequest, by gift, by deed and by purchase. He may own his necessities, which ordinarily would belong to his parent, if he purchases them with his own funds. And when the title of an infant in property becomes vested, his right and ownership therein is just as effective as that of others could be.⁴ This being true, letters of administration may, and in fact ordinarily should, be granted upon the estate of a minor.⁵

§ 752. Enlistment in army and navy.—The Revised Statutes of the United States provide⁶ that “No person under the age of twenty-one years old shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians.” It needs no argument or comment to establish the proposition that an infant who has arrived at the age of sixteen years, the lowest age fixed by the federal statute at which an infant may enlist in the military service of the government⁷ with the consent of his parents or

¹ Rev. St. Ind., § 3363; Applegate v. Conner, 93 Ind. 185; Bakes v. Gilbert, 93 Ind. 70; Kennedy v. Hudkins, 140 Ind. 570, 40 N. E. Rep. 53. And see Ward v. Lafferty, 19 Neb. 429, 27 N. W. Rep. 393.

² Harrod v. Myers, 21 Ark. 592.

³ Gillenwater v. Campbell, 143 Ind. 529, 41 N. E. Rep. 1041; Peterson v. Laik, 24 Mo. 541; Manufacturing Co. v. Lamb, 81 Mo. 321; Lessee of Tucker v. Moreland, 10 Pet. 58; Roof v. Stafford, 7 Cowen, 79; Huth v. Dock Co., 56 Mo. 202; Harris v. Ross, 86 Mo. 89;

Shipley v. Bunn, 125 Mo. 445, 28 S. W. Rep. 754; Phillipps v. Green, 3 A. K. Marsh. (Ky.) 7; Whitney v. Dutch, 14 Mass. 457; Gilkinson v. Miller, 74 Fed. Rep. 131; Ihley v. Padgett, 27 S. C. 300, 3 S. E. Rep. 468.

⁴ Dickinson v. Winchester, 4 Cush. (Mass.) 114, 118, 119; Wheeler v. St. Joseph & W. R. Co., 31 Kan. 640, 3 Pac. Rep. 297.

⁵ Wheeler v. St. Joseph & W. R. Co., 31 Kan. 640, 3 Pac. Rep. 297.

⁶ Rev. Stat. U. S., § 1117.

⁷ Rev. Stat. U. S., § 1116.

guardian, may enter the army and thereby become entitled to all the rights, privileges and immunities of a soldier, as well as subject to all proper orders of his superiors and the army regulations generally. The provision of the federal statute requiring the consent of the parent or guardian is not for the benefit of the infant. It is rather to give the parent or guardian an opportunity to interpose an objection to the service of the infant in the army or navy for any reason which may seem proper to them. Their right to object to the enlistment before the child arrives at his majority is arbitrary, and the motive, if any, which may prompt the parent or guardian to give or withhold consent cannot be inquired into. But this is not the case as to the infant. Having attained the necessary age of sixteen, and voluntarily become a soldier in the army by regular enlistment, he cannot himself complain that he is an infant and invoke the aid of the civil courts in procuring his discharge from service for this reason.¹ The enlistment thus effected is not a contract, but rather a status fixed by operation of law when the minor becomes properly enlisted. This status he cannot repudiate as he might an ordinary contract entered into during infancy.² The enlistment is in no case void, but voidable only, and voidable on the part of the parent or guardian, not at the instance of the infant.³ An infant, therefore, who has enlisted in the army, and by reason of his military misconduct has subjected himself to proceedings by court-martial, cannot escape the result of such a trial by an appeal to the civil courts.⁴ So if an infant enters the military service without the consent of his parent or guardian, he cannot escape punishment imposed by court-martial proceedings for desertion.⁵ And the fact that the infant may have deserted and successfully evaded the military authorities until after he attained his majority will not help his case in the least.⁶

¹ *Morrissey v. Perry*, 137 U. S. 157, 11 Sup. Ct. Rep. 57.

² *Morrissey v. Perry*, 137 U. S. 157, 11 Sup. Ct. Rep. 57; *United States v. Grimley*, 137 U. S. 147, 11 Sup. Ct. Rep. 54.

³ *In re Dowd*, 90 Fed. Rep. 718; *Morrissey v. Perry*, 137 U. S. 157, 11 Sup. Ct. Rep. 57.

⁴ *In re Dowd*, 90 Fed. Rep. 718.

⁵ *Solomon v. Davenport*, 30 C. C. A. 664, 87 Fed. Rep. 318; *In re Spencer*, 40 Fed. Rep. 149; *In re Kaufman*, 41 Fed. Rep. 876.

⁶ *Morrissey v. Perry*, 137 U. S. 157, 11 Sup. Ct. Rep. 57.

CHAPTER X.

MASTER AND SERVANT.

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§ 753. **Introductory remarks.**—The right of one to engage the services of another for the purpose of assistance, or performance of any kind of legitimate work or labor, is a natural right universally recognized. There are many kinds of servants, and as many kinds of service. The employment may be for domestic assistance, or for any other kind of work, even to the carrying-on of some gigantic commercial or business undertaking requiring thousands of servants. The services may be gratuitous, as are those of the wife to the husband, the child to the parent, and like instances; or they may be engaged by express contract for a stipulated or implied compensation. It

is not thought either proper or necessary to discuss the servitude of slavery or other involuntary service. Such discussion, if proper at all, is rather for the historian or legal antiquarian than the modern legal commentator. Nor will that wide branch of the law of master and servant pertaining to the service of employees in the large business and public as well as *quasi*-public enterprises and undertakings of the present day be discussed at exhaustive length; for to do this would require a very large volume. However, the importance of the subject demands that some consideration be given this class of service as well as that of a more strictly domestic nature, and it will be attempted to give a fair outline of the principles controlling the more important questions which may arise or are properly embraced within the title of Master and Servant.

§ 754. **Definition of servant.**— While servants may be classed as “slaves, hired servants and apprentices,”¹ Blackstone, denying the status of slavery because the air of England is too pure for a slave to breathe—and the air of this country is now as pure as that of England,—classes servants as menials, as apprentices, laborers, and, in a restrictive sense, as stewards, factors and bailiffs.² Other writers give definitions more or less similar. A servant is one who serves another. Generally speaking, it would not matter in what capacity he serves. Everything one does for another, whether for hire or gratuitously, is a service of some kind, and the doer a servant. The character of the work or service may justify some classification, which may be entirely proper and afford a criterion for distinguishing the authority or duty of the master or servant, or both. Necessarily, there are many grades of service, and naturally and logically as many grades of servants. Some classes of service require very high attainments and accomplishments in the particular duty, and the performance of the service may be attended with the most gigantic and solemn responsibilities. For instance, the principal officers in the army and navy, officers of the great railroad and other commercial corporations or business enterprises of many kinds, are burdened with onerous duties. The responsibilities of these require the utmost skill and proficiency in the service for which they are selected;

¹ 2 Kent, Comm. 248.

² 1 Bl. Comm. 422 *et seq.*

while, on the other hand, the service may be of such a nature as to require little intelligence and perhaps only medium physical strength. All who represent others in any capacity and who are under the control and direction of their employers are servants in the comprehensive sense of the term. An agent is, in a sense, a servant by reason of his employment. In fact, the relation of principal and agent and of master and servant are in many respects strikingly analogous, so much so, indeed, that it is sometimes difficult to determine whether the relation of master and servant or principal and agent exists. To some extent it may be both. In fact, every agency implies a service and subordination to a principal or master, which conditions are among the essential elements of the relation of master and servant. The agent carries out the instructions of his principal, and in doing so binds him to the extent that he acts within the scope of his real or apparent authority, just as the master is liable for the acts of the servant within the reasonable scope of the employment.

§ 755. **Involuntary slavery.**—There is no such thing in America at this day as a state of slavery, pure and simple, nor could such a state of things be brought about under the common law of England, as it was not permitted by that law for a man to sell himself into slavery; for by the sale the price became the property of the master and the transaction amounted, in practical effect, to a voluntary submission to a state of servitude. To be sure, in addition to this, such an agreement to serve as a slave would be clearly and palpably contrary to the policy of the state whose laws forbid slavery.¹ The question of slavery is now practically out of the politics and policy of the country, and rarely can a question arising out of the institution of slavery come up at this day for adjudication. Occasionally a question of the validity of a slave marriage, the legitimacy of children of former slaves, and the rights of inheritance may arise, but these considerations have had attention in other chapters, and it is thought best to confine the discussion of this chapter to the living questions touching the law of master and servant as far as can be done within a proper scope. While slavery is forbidden by the law of the land, yet the de-

¹ 1 Bl. Comm. 424.

tention and imprisonment of a violator of the law as a punishment for his crime is not slavery within the meaning of the constitution of the United States, and not forbidden thereby. This species of restraint is a necessity to enable the state to uphold its laws, punish offenders, secure peace and good order, and protect property rights and promote the general welfare.

§ 756. When master may discharge servant.—When a master employs a servant there is always implied in the contract an undertaking on the part of the servant to obey all proper instructions, be attentive to his work, diligent in the performance of his duties, and otherwise faithful in his service. And when by reason of neglect, insubordination, incompetency or any palpable misconduct or wilful disobedience the servant renders himself unfit for the duties he has undertaken, the master is not bound to continue him in his service until the end of the period of the contract, but may at once discharge him.¹ The right to discharge exists also where the servant improperly refuses to obey a superior under whom he is placed by the master, or where his conduct towards such superior, the latter not being at fault, is incompatible with a faithful and proper discharge of his duties.² But the disobedience of instructions or orders which will justify the master in discharging his servant must be of such orders as properly and legitimately appertain to the service for which the servant is engaged, and such as the master has a right to have obeyed. The master cannot order his servant to do a thing not embraced in the class of service for which the servant was employed, or to do a thing which is unlawful or wrong, and, upon a refusal by the servant to honor such improper direction, discharge him.³

¹ *Congregation of the Children of Israel v. Peres*, 2 Cold. (Tenn.) 620; *Pape v. Lathrop*, 18 Ind. App. 633, 46 N. E. Rep. 154; *Alberts v. Stearns*, 50 Mich. 349, 15 N. W. Rep. 505; *Maxelbaum v. Limberger*, 78 Ga. 43, 3 S. E. Rep. 257; *Huntington v. Claffin*, 33 N. Y. 182; *Posey v. Garth*, 7 Mo. 94; *Lacy v. Getman*, 119 N. Y. 109, 23 N. E. Rep. 452; *Kidd v. American Pill & Medicine Co.*, 91 Iowa, 261, 59 N. W. Rep. 41; *Leatherberry v. Odell*, 7 Fed. Rep. 641; *Jones v. Trinity Church*, 19 Fed. Rep. 59; *Gray v. Shepard*, 147 N. Y. 177, 41 N. E. Rep. 500; *Peltz v. Printz* (Pa.), 40 Atl. Rep. 486; *Mathews v. Park Bros.*, 146 Pa. St. 384, 23 Atl. Rep. 208; *Callo v. Brouncker*, 4 Car. & P. 518.

² *Darst v. Mathieson Alkali Works*, 81 Fed. Rep. 284.

³ *Hamilton v. Love* (Ind.), 43 N. E. Rep. 873.

If the servant becomes so addicted to drink that he is, for this reason, unfit to further discharge his duties as servant, this fact will justify the master in discharging him.¹ And if the servant fails to devote his full time to his work the master may discharge him. His whole time belongs to his master, and he has no right to take any part of it for purposes other than his service.² Of course this does not mean every minute of the day and night. If the servant work the full hours usually required or customary, or the number agreed upon by the contract, no right of discharge would exist. And when a proper cause for discharging a servant exists, the master is not required to at once send him away upon peril of being held to have waived the misconduct. He may defer the discharge for a short or a reasonable time,—for instance, a day or two.³ Where a servant attacked his master and beat him unlawfully with a dangerous weapon, it has been held very properly that this is a good cause for the discharge of the servant before the termination of the contract of service.⁴ And where the conduct or deportment of the servant towards those with whom the master necessarily has dealings in the course of his business is such as to injure his business or drive away trade or custom, the master may discharge him for incivility of conduct towards those upon whom the master depends for his business success. Were it otherwise, the master might have to keep a very obnoxious servant.⁵

§ 757. Cause for discharge — Question of fact.—When, upon the discharge of the servant by the master for any cause, it is disputed that there existed a lawful reason for the discharge, and there is evidence legitimately tending to sustain either theory, the issue, of course, becomes one of fact.⁶ But whether the alleged cause for dismissal is a proper one or not is a question of law, not of fact. The jury are only to determine whether the fact

¹ *McCormick v. Demary*, 10 Neb. 515, 7 N. W. Rep. 283; *Gonsolis v. Gerhart*, 31 Mo. 585; *Wise v. Wilson*, 1 Car. & Kir. (N. P.) 662; *Huntington v. Claffin*, 10 Bosw. 262; *Bass Furnace Co. v. Glasscock*, 82 Ala. 452, 2 S. Rep. 315; *Dunkell v. Simons*, 7 N. Y. S. 655; *Smith v. St. Paul & D. R. R. Co.*, 60 Minn. 330, 62 N. W. Rep. 392.

² *Stebbins v. Waterhouse*, 58 Conn. 370, 20 Atl. Rep. 480.

³ *Huntington v. Claffin*, 10 Bosw. 262.

⁴ *Henderson v. Stiles*, 14 Ga. 135.

⁵ *Leatherberry v. Odell*, 7 Fed. Rep. 642; *M'Murray v. Boyd*, 58 Ark. 504, 25 S. W. Rep. 505.

⁶ *Erving v. Ingram*, 24 N. J. Law, 520; *Solomon v. Vallette*, 152 N. Y. 147, 46 N. E. Rep. 324.

exists the one way or the other. Whether the fact, if existing, is sufficient or not, is exclusively for the court.¹ This being true, it would of course be improper to admit evidence of any fact which, if established, would not afford a lawful excuse for discharging the servant. It has been held that the overdraw-
ing of his salary by a servant from his master, without the consent of the latter, is a good ground for dismissal.² And of course, upon a like principle, the master may discharge his servant when the latter is guilty of stealing from him, for the law does not require a master to keep a thief who may rob him systematically to his great injury.³

§ 758. Improper discharge of servant — Right of servant to sue for breach of contract — Measure of recovery.— When the servant, upon being improperly discharged by his master, elects to sue for breach of the contract rather than wait until the expiration of the same, or have any other redress the law may entitle him to, his right of recovery will be the amount of damages he has sustained by the breach, not exceeding the amount he would otherwise have been entitled to receive.⁴ “It is the breach, and not the time of the discharge or when the action was brought, that gives the damages. If the consequences for which the law renders the employer responsible develop so as to create an absolute injury at the time of the trial, he is entitled to a compensation for such injury. He cannot recover the damages he has suffered after the trial, for the obvious reason that they cannot be assessed in advance;” for, were it otherwise, he might obtain other and even more lucrative employment after recovering judgment, by reason of which he would not be injured so much as he has received a judgment for; or he might die long before the end of the period of service, in which event his estate could recover for his salary

¹ *Stephens v. Crane*, 37 Mo. App. 487.

² *Smith v. Baker*, 101 Mich. 155, 59 N. W. Rep. 394.

³ *Faqua v. Massie*, 95 Ky. 387, 25 S. W. Rep. 875.

⁴ 2 Sedgwick, Dam. (8th ed.), § 667; 2 Suth. Dam. (2d ed.), §§ 692–695; Wood, Master & S., p. 246; Sutherland v. Wyer, 69 Me. 64; Roberts v.

Crowley, 81 Ga. 429; *Stewart v. Walker*, 14 Pa. St. 293; *Willoughby v. Thomas*, 24 Gratt. (Va.) 521; *Fowler v. Walker*, 25 Tex. 695; *Hunt v. Crane*, 33 Miss. 669; *Nixon v. Myers*, 141 Pa. St. 477, 21 Atl. Rep. 670; *Utter v. Chapman*, 38 Cal. 659; *Litchen v. Brooks*, 75 Tex. 196, 12 S. W. Rep. 975; *Fee v. Orient Fertilizing Co.*, 36 Fed. Rep. 509.

only to the time of his death.¹ But punitive or vindictive damages, however, are never allowed for the breach of a contract by the master in improperly discharging his servant before the time of the contract expires. No matter from what motive the master may act, the servant could not have recovered more than the contract price had he continued the service until the end of the time; and the law does not, in any case, allow him to recover more, under whatsoever pretext.²

§ 759. Improper discharge of servant—Remedies.—When a master discharges his servant without lawful excuse or reason the servant has several remedies, any one of which he may pursue, though he may not pursue all; for a redress in one form, or under one style or kind of action, will preclude the servant from any right to recover in any other kind of action or other tribunal, as the law recognizes the right to only one compensation for a single injury. If the servant prefer, he may elect to regard the agreement for service at an end and sue the master for the value of the services already performed, for as to these, when the contract itself is renounced, there remains no agreement to pay; and the law gives the right of recovery for the actual value of the services rendered, whatever that may be; or, if the servant prefer, he may wait until the end of the period of service and sue for his full wages, the master being then entitled, of course, to deduct from the stipulated price any amount the servant should have earned by proper diligence in the meantime. He may also, if he wish, sue at once upon his discharge for the damages resulting from the improper dismissal.³ The aggrieved servant, however, cannot

¹ *Fowler v. Armour*, 24 Ala. 194; *French*, 10 Misc. Rep. 672, 31 N. Y. S. Wood, Master & S., p. 260; 1 Sedgwick, Dam. (8th ed.), § 85; *Gorden v.*

Brewster, 7 Wis. 355; *Everson v.* ² *Gorden v. Brewster*, 7 Wis. 355.

Powers, 89 N. Y. 527; *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. 1113; *Darst v. Mathieson Alkali Works*, 81 Fed. Rep. 284; *Pape v. Lathrop*, 18 Ind. App. 633, 46 N. E. Rep. 154; *Mt. Hope Cemetery Ass'n v. Weidenman*, 139 Ill. 67, 28 S. E. Rep. 874; *Coleburn v. Woodward*, 31 Barb. 881; *Lichtenstein v. Brooks*, 75 Tex. 196, 12 S. W. Rep. 975; *Bassett v.* ³ *Colburn v. Woodworth*, 31 Barb. 381; 2 Sedgwick, Dam. (8th ed.), § 665; *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. Rep. 1113; *Strauss v. Meertief*, 64 Ala. 299; *Sutherland v. Wyer*, 67 Me. 64; *Prichard v. Martin*, 27 Miss. 305; *James v. Board of Commissioners*, 44 Ohio St. 226, 6 N. E. Rep. 246; *Pape v. Lathrop*, 18 Ind. App. 633, 46 N. E. Rep. 154.

pursue all these remedies either at the same time or at different times. He must make his election upon which one he will rely, and this done, he will be confined to the remedy selected, whether it prove the most satisfactory to him or not.¹

§ 760. Master must elect to discharge his servant within a reasonable time.—Where a servant gives his master a good cause to discharge him, the master should exercise his option to discharge within a reasonable time. He may condone or waive the right to dismiss, and this may be by delay merely, instead of any express understanding. The extent of the delay in making the election will in all cases be material, and, as it is long or short, will tend to prove or disprove the waiver of the right to discharge. It follows, therefore, that the question whether the master has condoned the act of the servant justifying a discharge by delaying action will usually be one of fact.² But sometimes a master may discharge his servant where he is guilty of continued misconduct, though he may have waited an unreasonable time after the first offense to exercise the right to discharge upon the happening of succeeding misconduct.³ This is analogous to the condonation of causes for divorce. The forgiveness of the misconduct or injury is upon the implied condition that it will not again occur.⁴ As soon as the wrong is renewed it relates back to the original injury or misconduct and revives it with continuing effect.⁵ The master, however, need not discharge the servant the very instant he learns of the misconduct, if he does so in a reasonable time thereafter.⁶ But whenever he retains a servant longer than a reasonable time after learning of his incompetency, or any other ground of discharge, without exercising the option to dismiss him, this will usually be regarded as *prima facie* establishing a determination on the part of the master to condone

¹ Colburn v. Woodworth, 31 Barb. 381; Watts v. Todd, 1 McMull. (S. C. Law), 26.

² Jonas v. Field, 83 Ala. 445, 3 S. Rep. 893.

³ Little v. Dougherty, 11 Colo. 103, 17 Pac. Rep. 292.

⁴ Whispell v. Whispell, 4 Barb. 217; Langdon v. Langdon, 25 Vt. 678; Harrison v. Harrison, 20 Ala. 629.

⁵ Durant v. Durant, 1 Hag. Ecc. 736; Phillips v. Phillips, 27 Wis. 252; Heist v. Heist, 48 Neb. 794, 67 N. W. Rep. 790; Burr v. Burr, 10 Paige Ch. 20; Smith v. Smith, 4 Paige, 462; Wessels v. Wessels, 28 Ill. App. 253; Thackberry v. Thackberry, 101 Mich. 102, 59 N. W. Rep. 400.

⁶ Dunkell v. Simons, 7 N. Y. S. 655.

the wrong.¹ And when the master, with knowledge of a good cause for the dismissal of his servant, nevertheless continues to accept services for a time beyond that in which he should exercise his option to dismiss, he will not afterwards be permitted to discharge the servant.² But if he can show a proper and reasonable excuse for the delay in acting, it is otherwise,—the *onus* of making such proof being on the master.³ What would be such an excuse as would justify the master in delaying the discharge will be a question for the jury.⁴ The question is really one of condonation; for, when the misconduct is condoned, the master has no right to discharge for the cause which has been forgiven.⁵ And the question of fact is rather an inquiry whether the circumstances of the case show a condonation or not.⁶

§ 761. Discharge of servant — Duty to get other work.—When a master improperly discharges his servant before the expiration of the contract time of service, it at once becomes the duty of the dismissed employee to use reasonable diligence to get other work at as good wages as possible; for he will not be permitted to unnecessarily remain idle merely because he has been discharged, and at the same time require his master to pay the agreed wages for the full time.⁷ If the servant can get other employment and refuses to do so, he will be limited in his right of recovery for wages to the gross amount agreed to be paid him for the full time, less what he should and could, by reasonable efforts, have earned at other employment.⁸ But

¹ *M'Murray v. Boyd*, 58 Ark. 504, 25 S. W. Rep. 505.

² *Jones v. Trinity Church*, 19 Fed. Rep. 59; *Leatherberry v. Odell*, 7 Fed. Rep. 641.

³ *Jones v. Trinity Church*, 19 Fed. Rep. 59; *M'Murray v. Boyd*, 58 Ark. 504, 25 S. W. Rep. 505.

⁴ *M'Murray v. Boyd*, 58 Ark. 504, 25 S. W. Rep. 505.

⁵ *Jones v. Trinity Church*, 19 Fed. Rep. 59.

⁶ *M'Murray v. Boyd*, 58 Ark. 504, 25 S. W. Rep. 505.

⁷ *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. Rep. 1113; *Sutherland*

v. Wyer, 67 Me. 64; *Chamberlin v. Morgan*, 68 Pa. St. 168; *Miller v. Mariner's Church*, 7 Me. 38; *Emery v. Steckel*, 126 Pa. St. 171, 17 Atl. Rep. 601; *Williams v. Chicago Coal Co.*, 60 Ill. 149; *Gillis v. Space*, 63 Barb. 177; *Congregation of the Children of Israel v. Peres*, 2 Cold. (Tenn.) 620; *Barker v. Knickerbocker Life Ins. Co.*, 24 Wis. 630; *Meade v. Rutledge*, 11 Tex. 54; *Lichtenstein v. Brooks*, 75 Tex. 196, 12 S. W. Rep. 975; *Nations v. Cudd*, 22 Tex. 550.

⁸ *Castigan v. Mohawk & H. R. R. Co.*, 2 Denio, 609; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162.

the law does not require that the discharged servant make extraordinary efforts to get other work; his duty in this respect is fully discharged when he in good faith uses reasonable efforts to get other employment.¹

§ 762. Discharge of servant — Duty to find other work — Class of work.— When a servant is discharged he is not compelled to find work of a character for which he is not fitted by training, tact or otherwise, or work of a different character from that undertaken; his duty in this respect is complied with if he endeavors in good faith to find work of a like kind to that already agreed to be performed. And if he fails in this he will be entitled to receive his pay for the full period of his employment.² But while the law does not require a wrongfully discharged servant to seek employment of a different character from that undertaken, yet if he should engage in another, whereby he earns wages, the master will be entitled to have the amount thus earned deducted from what would be otherwise recoverable on the contract.³

§ 763. Measure of recovery by servant for discharge — Right of master to deduct what servant might have earned at other employment.— When the master, having engaged his servant for a specified time, discharges him from service without lawful cause before the expiration of such time, he will thereby become liable in law to such servant for the stipulated wages for the entire time of the contract, less any amount the servant might have earned elsewhere at like work by due diligence. This rule applies, of course, only where the servant himself is not at fault.⁴ If a servant should, upon being dis-

¹ *Jones v. Graham & Morton Transp. Co.*, 51 Mich. 539, 16 N. W. Rep. 893.

² *Walworth v. Pool*, 9 Ark. 394; *Castigan v. Mohawk & H. R. R. Co.*, 2 Denio, 609; *Gillis v. Space*, 63 Barb. 177; *Van Winkle v. Satterfield*, 58 Ark. 617, 623, 25 S. W. Rep. 1113; *Gardenhire v. Smith*, 39 Ark. 280; *Koenigkraemer v. Missouri Glass Co.*, 24 Mo. App. 124; *Miller v. Woolman-Todd Boot & S. Co.*, 26 Mo. App. 57;

Strauss v. Meertief, 64 Ala. 299; *Sutherland v. Wyer*, 67 Me. 64; *Stephens v. Crane*, 37 Mo. App. 487; *Fuch v. Koerner*, 107 N. Y. 529, 14 N. E. Rep. 445; *Hinchcliffe v. Koontz*, 121 Ind. 422, 23 N. E. Rep. 271.

³ *Stephens v. Crane*, 37 Mo. App. 487.

⁴ *Pape v. Lathrop*, 18 Ind. App. 633, 46 N. E. Rep. 154; *Maxelbaum v. Linberger*, 78 Ga. 43, 3 S. E. Rep. 257; *Chaplain v. Detroit Stamping Co.*, 68 Mich. 238, 36 N. W. Rep. 571; *South-*

charged, get other work for the remainder of the time of service, and by reason of sickness be compelled to cancel the second contract, the master would be entitled to deduct only the amount the servant earned up to the time of getting sick.¹ And when, by the terms of the contract of service, either party may terminate the relation upon giving to the other notice of one week, month, etc., as the case may be, the measure of damages for a breach of contract in being improperly discharged will be his salary for the time the notice is required to be given.² In such a case the discharge is equivalent to notice, and the servant, of course, would not be entitled to more damages than his wages would have amounted to had he continued work after notice of termination for the period the notice is required to be given.

§ 764. Discharge of servant by master before end of term of employment — Rights of servant.— When a master employs his servant for a specified time he has no right to discharge him until that time has expired. If he does so he will be liable to the discharged servant for the salary agreed to be paid for the whole time that the servant remains ready and willing to perform the contract on his part and uses due diligence to get other like work elsewhere.³ The servant may,

wick v. Bernhard, 17 N. Y. S. 478; Leyenberger v. Rebanks, 55 Ill. App. 441; Baltimore B. B. Club & E. Co. v. Pickett, 78 Md. 375, 28 Atl. Rep. 279; Allen v. Maronne, 93 Tenn. 161, 23 S. W. Rep. 113; Fish v. Glass, 54 Ill. App. 655; Efron v. Clayton (Tex. Civ. App.), 35 S. W. Rep. 424; Babcock v. Appleton Mfg. Co., 93 Wis. 124, 67 N. W. Rep. 33; Boland v. Glendale Quarry Co., 127 Mo. 320, 30 S. W. Rep. 151; Worthington v. Oak & Highland P. Imp. Co., 100 Iowa, 39, 69 N. W. Rep. 258; Stearnes v. Lake Shore & M. S. Ry. Co. (Mich.), 71 N. W. Rep. 148.

¹ Bassett v. French, 10 Misc. Rep. 672, 31 N. Y. S. 667.

² Derry v. Board of Education, 102 Mich. 631, 61 N. W. Rep. 61. And see, too, Cote v. Bates Mfg. Co. (Me.), 39 Atl. Rep. 280.

³ Walworth v. Pool, 9 Ark. 394; Miller v. Mariner's Church, 7 Greenl. (Me.) 51; Shannon v. Comstock, 21 Wend. 457; Fain v. Goodwin, 35 Ark. 109; Gardenhire v. Smith, 39 Ark. 280, 287; Costigan v. Mohawk & H. R. R. Co., 2 Denio, 609; Byrd v. Boyd, 4 McCord (S. C.), 246; Van Winkle v. Satterfield, 58 Ark. 617, 25 S. W. Rep. 1113; McDaniel v. Parks, 19 Ark. 671; Hendrickson v. Anderson, 5 Jones (N. C. Law), 246; Jones v. Jones, 2 Swan (Tenn.), 605; Collett v. Smith, 143 Mass. 473, 10 N. E. Rep. 173; Utter v. Chapman, 38 Cal. 659; Chamberlin v. Morgan, 68 Pa. St. 168; Emery v. Steckel, 126 Pa. St. 171, 17 Atl. Rep. 601; 2 Sedgw. Damages (8th ed.), § 667; Gates v. School District, 57 Ark. 370, 21 S. W. Rep. 1060; Jaffray v. King, 34 Md. 217; Saxonia

upon such a wrongful discharge, show any amount of damages he legitimately can under the recognized rules of evidence and procedure. But if no evidence is introduced as to the value, the amount agreed to be paid will be *prima facie* the amount recoverable, according to the time the servant has worked, as the parties themselves have agreed that this is a reasonable and proper value.¹ And in order for the servant to maintain an action for damages flowing from a wrongful discharge it is not necessary, in suing, that he negative all the grounds authorizing a discharge by the master. The law, in the absence of a contrary showing, presumes that the servant has faithfully performed his duty; and if the master can show any good reason for the discharge, it is matter of defense which the master must set up and properly prove.² When a servant has been discharged the master is *prima facie* at fault, and he must, in order to successfully defend an action by the servant for his wages, show that the servant is to blame.

§ 765. Improper discharge of servant — Duty of servant to remain ready to work.—Generally, where a servant has begun work for his master and been wrongfully discharged, it is not incumbent on him to hold himself in constant readiness to perform the service, for the discharge is a repudiation of the contract by the master and places him at arm's length with the servant.³ Indeed, to require the discharged servant to hold himself constantly ready to work would deprive him of the ability to get other employment, which the law always requires of him. It has been held, where a servant is improperly discharged under circumstances which make it impossible to get

Mining & Reduction Co. v. Cook, 7 Pac. Rep. 1111; Utter v. Chapman, 38 Colo. 569, 4 Pac. Rep. 1111; Gifford v. Waters, 67 N. Y. 80; Home Machine Co. v. Bryson, 44 Iowa, 159; Ætna Life Insurance Co. v. Nexsen, 84 Ind. 847.

¹ Emery v. Steckel, 126 Pa. St. 171, 17 Atl. Rep. 601; King v. Stiern, 44 Pa. St. 99; Miller v. Woolman-Todd Boot & S. Co., 26 Mo. App. 57; Koenigkraemer v. Missouri Glass Co., 24 Mo. App. 124; Saxonia Mining & Reduction Co. v. Cook, 7 Colo. 569, 4

Pac. Rep. 1111; Utter v. Chapman, 38 Cal. 659; School Directors v. Kimmell, 31 Ill. App. 537; Hamilton v. Love (Ind.), 43 N. E. Rep. 873; Hinchliffe v. Koontz, 121 Ind. 422, 23 N. E. Rep. 271.

² Collins v. Glass, 46 Mo. App. 297.

³ Ole B. Bull v. Schuberth, 2 Md. 38; Adams v. Pugh, 7 Cal. 150; Brown v. Board of Education, 29 Ill. App. 572; Jones v. Trinity Church, 19 Fed. Rep. 59.

other similar work, he may sue at once for the amount which would be due at the expiration of the contract upon full performance.¹ But this ruling does not stand, it would seem, upon a very firm foundation. If, for instance, A. hires to B. for a year, and is discharged the next day without cause under such circumstances as to thus put the two at arm's length, B. would, in an action against him by A. instituted at once, be liable to A. for the amount of the wages to the end of the period of contract, when in fact A. might die within a week, and his estate would reap the benefit of a contract practically for the whole year, while A. could not possibly have performed it by reason of the necessary termination thereof by his death. And in any event, under such circumstances, it would have to appear that the discharged servant could do no work of a like character profitably for himself, as it would ordinarily be his duty to do similar work in his own behalf if his circumstances and surroundings were such as to make such work necessary or practicable. And when he could do similar work for himself to advantage, the master would have the right to have the value thereof deducted from the amount that would be otherwise recoverable. The servant, however, may of course, upon being improperly discharged, treat the contract as rescinded and sue for the value of his services up to the time of the dismissal.² And the rule is the same where the servant is discharged before he begins work. For instance, if the master employs his servant to begin work at a future day, and the servant, in compliance with the contract, reports at the proper time to go to work, and the master refuses to receive him or permit him to carry out his part of the contract, the servant may recover for the breach, or in other form of action, with like effect that he might do had he already begun work. And when the servant is thus forbidden by the master to perform the contract or begin work, he need not hold himself in readiness to perform for the full time of the contract, but may recover such damages as he may have sustained by reason of the breach without doing so.³ In cases of this kind, however, it

¹ Prichard v. Martin, 27 Miss. 305.

Prichard v. Martin, 27 Miss. 305;

² Brinkley v. Swicegood, 65 N. C. 626.

Brown v. Board of Education, 29 Ill. App. 572; Byrd v. Boyd, 4 McCord

³ Howard v. Daly, 61 N. Y. 362; (S. C. Law), 246.

would be better for the servant not to sue until the end of the period of service as agreed upon, though he would be entitled to nominal damages, at least, by suing at any time. But whatever he might be able to earn at other like work for the period of the contract would have to be deducted from the whole amount which would be otherwise recoverable at the end of the time of employment. And if the servant should succeed in earning as much during this time as he could have done under the broken contract, he would not be entitled to recover anything more than nominal damages, for then he would not have sustained any actual, material damages. If the servant is discharged after he has begun the service, he may then treat the agreement as rescinded and sue for the value of his work to the time of discharge, if he wishes; or he may treat the agreement as rescinded and recover damages for the breach thereof.¹ But if he elects to treat the contract as rescinded, as he may do, he cannot recover for the whole term of the contract, but only for the services rendered to the time of the discharge.² And where the hire is to be paid in instalments, as at the end of every week, month, etc., as the case may be, an action by a discharged servant for the wages accrued may be maintained at the end of the first instalment period, and thereafter in separate actions as each instalment falls due, until all the wages have been recovered to the end of the contract period.³

§ 766. Wrongful discharge — Duty of servant to find other work — Burden of proof.— When the servant proves a contract of service between himself and master, a breach thereof by the master in not paying him, and a performance or readiness to perform on his part, he has, generally speaking, made out a *prima facie* case for a recovery of his wages for the time of the contract. If the master desires to avail himself of the rule of law which requires the servant to find work elsewhere, in order that he may be entitled to a deduction of such amount as he might have earned at other work, the burden is upon

¹ Richardson v. Eagle Machine Law), 26; East Tenn. Va. & Ga. R. Works, 78 Ind. 422; Wright v. Faulkner, 37 Ala. 274. R. Co. v. Stuart, 7 Lea (Tenn.), 397.

² Blun v. Holitzer, 53 Ga. 82.

³ Watts v. Todd, 1 McMull. (S. C.

him to prove every fact necessary to establish this defense in whole or in part, as the case may be. "The defense set up should be proved by the one who sets it up. He seeks to be benefited by a particular matter of fact, whereas the opposite rule would call upon the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is the wrong-doer, and the presumptions between him and the person wronged should be made in favor of the latter." For this reason, therefore, the *onus* must in all cases be upon the defendant."¹ And to the extent that the master shows that the discharged servant could have earned other wages at similar work will he be entitled to a reduction from the contract price for the service.² Of course the fact that the servant might have earned other wages at work elsewhere is by no means a complete defense, and should, upon principle, not be. But the deduction must be confined to, and must not exceed, the amount that should and could have been earned by the servant after being improperly discharged. In other words, the possibility of having been able to earn other wages goes in mitigation, not in bar, of the damages recoverable.³ But in order for the master to have this credit it is not necessary that he show that the servant actually worked at other employment. It is sufficient that he only show that other compensation could have been earned, as he is entitled to deduct the same whether the servant availed himself of an opportunity to earn other wages.

¹ *Farrell v. School District*, 98 Mich. 43, 56 N. W. Rep. 1053; *Allen v. Whitlock*, 99 Mich. 492, 58 N. W. Rep. 470; *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. Rep. 1113; *Costigan v. Mohawk & H. R. R. Co.*, 2 Denio, 609; *Walworth v. Pool*, 9 Ark. 394, 404; *Sutherland v. Wyer*, 67 Me. 64; *Howard v. Daly*, 61 N. Y. 362; *Gillis v. Space*, 63 Barb. 177; *King v. Steiren*, 44 Pa. St. 99; *Brown v. Board of Education*, 29 Ill. App. 572; *Saxonia Mining & Reduction Co. v. Cook*, 7 Colo. 569; *Dorst v. Mathieson Alkali Works*, 81 Fed. Rep. 284; *Turner v. Kowenhoven*, 100 N. Y. 115, 2 N. E. Rep. 637.

² *Printing Co. v. Morss*, 60 Ind. 153;

Dunn v. Johnson, 33 Ind. 54; *Cincinnati, L. & St. L. Ry. Co. v. Lutes*, 112 Ind. 276, 11 N. E. Rep. 784; *Hamilton v. Love* (Ind.), 43 N. E. Rep. 879.

³ *Williams v. Chicago Coal Co.*, 60 Ill. 149; *Emery v. Steckel*, 126 Pa. St. 171, 17 Atl. Rep. 601; 2 *Sedgwick, Damages* (8th ed.), § 667; *Williams v. Anderson*, 9 Minn. 50; *Missouri, K. & T. Ry. Co. v. Faulkner* (Tex. Civ. App.), 31 S. W. Rep. 543; *Pinet v. Montague*, 103 Mich. 516, 61 N. W. Rep. 876; *Rosenberger v. Pacific Coast Ry. Co.*, 111 Cal. 813, 43 Pac. Rep. 963; *Howard v. Daly*, 61 N. Y. 363; *Babcock v. Appleton Mfg. Co.*, 93 Wis. 124, 67 N. W. Rep. 33.

or not. For, were this not true, the servant, upon being discharged, might wilfully refuse to receive other employment.¹

§ 767. **Discharge of servant — Duty to work for himself.** As a general rule the master has no right to offset the work which a servant does for himself after being discharged and during the period of employment, unless the work thus performed by the servant in his own behalf be incompatible with the duties he had undertaken for his master.² And when the servant upon being discharged, and after an ineffectual effort to get other work, performs some casual labor for himself, being ready at all times, nevertheless, to comply with his engagement of service with his master, such work cannot be charged by the master against the servant as a deduction from any amount the servant would otherwise have the right to recover by reason of the wrongful discharge.³

§ 768. **When master may not discharge.**— When a servant engages with his master to do a certain or specified kind of service or work, and faithfully performs his duties according to contract, the master has no legal right to discharge him or refuse to pay him for his services because the servant may have engaged in other work during the time of service for himself or others, where such work was not incompatible with the duties undertaken and does not interfere with a full and proper performance of the same.⁴ And the fact that the servant brings an action against his master to recover instalments of wages which are due and payable under the contract of service will not justify the master in discharging him, for the servant has a right to sue for his wages. If the master wishes to avoid a suit by his servant it can be done by complying with his contract.⁵ There might be instances, however, where a master would be justified in discharging his servant, when the latter brings groundless suits against him for vexation or other like purpose; but as the bringing of a suit in good faith for the

¹ King v. Steiren, 44 Pa. St. 99.

³ Harrington v. Gies, 45 Mich. 374,

² Sedgwick, Damages (8th ed.), § 667; 8 N. W. Rep. 481.

Van Winkle v. Satterfield, 58 Ark.

⁴ Jaffray v. King, 34 Md. 217.

617, 25 S. W. Rep. 1113; Gates v.

⁵ Clay Commercial Telephone Co.

School District, 57 Ark. 370, 21 S. W.

v. Root (Pa.), 4 Atl. Rep. 828.

Rep. 1060.

recovery of wages does not justify a dismissal by the master, neither does an action by the servant against the master upon an independent action not connected in any way with the contract of service.¹ The fact that the master is or becomes insolvent will not justify him in sending the servant away, nor prevent the servant from bringing an action for any amount due him for services. The right of action rests upon contract, not upon the solvency or insolvency of the master.² Nor will slight discourtesies of the servant, or occasional hasty words towards the master, justify a discharge, especially where the character of the service is naturally calculated to provoke.³ Nor will a slight deviation from the instructions of the master, where it does not materially injure either the master or his business.⁴ So where a traveling salesman deviated slightly from his route in order to see his family on Sunday, this was held to be no ground for a discharge, it not appearing that any real injury had resulted to the master because thereof.⁵ Where by the terms of the contract of service the master might discharge his servant at any time if he should be satisfied of his incompetency, this does not authorize or warrant a dismissal if the dissatisfaction of the master is merely arbitrary. The dissatisfaction must be in good faith and not imagined, to use as a pretext or excuse for a discharge in the absence of other good reason.⁶ And the master cannot lawfully send his servant away because the servant refuses to obey an order of the master, the obeying of which would be criminal, grossly wrong or immoral.⁷ And in all cases of a discharge of a servant the *onus* is on the master to show that he was justified in sending him away.⁸ It has been held that where a master discharges his servant, even for misconduct of any kind, and the servant has performed his work in part, the servant may recover on

¹ Clay Commercial Telephone Co. v. Root (Pa.), 4 Atl. Rep. 828.

² Vaunxem v. Bostwick (Pa.), 7 Atl. Rep. 598; Thomas v. Williams, 1 Ad. & E. 685; Vail v. Manufacturing Co., 32 Barb. 564; Feriera v. Sayers, 5 Watts & S. (Pa.) 210; Lewis v. Atlas Mutual Life Ins. Co., 61 Mo. 534.

³ Leatherberry v. Odell, 7 Fed. Rep. 642.

⁴ Hamilton v. Love (Ind.), 43 N. E. Rep. 873.

⁵ Milligan v. Sligh Furniture Co. (Mich.), 70 N. W. Rep. 183.

⁶ Smith v. Robson, 148 N. Y. 252, 42 N. E. Rep. 677.

⁷ Singer v. McCormick, 4 Watts (Pa.), 265.

⁸ Milligan v. Sligh Furniture Co. (Mich.), 70 N. W. Rep. 183.

a *quantum meruit* the value of the services rendered to the time of the discharge, though he could not recover by virtue of the contract of service, as he has forfeited all rights by virtue thereof.¹ “Although the employer may have good cause to turn off his servant, yet if he has faithfully discharged his duty up to the time that the cause of dismissal arises, he can claim his wages for the time he has served.”² This is the language of the learned South Carolina court, but it is not in accord with the better authority and reasoning, as will appear elsewhere in this chapter.

§ 769. Right of servant to recover wages where he quits the master.— The fact that a servant quits his master will not necessarily preclude him from recovering his wages for the period of the contract, both earned and unearned. The right of recovery exists where, by the mistreatment by the master of the servant, or other misconduct on his part incompatible with the peaceful and unmolested performance of duty by the servant, he is compelled to quit the service. The master cannot evade or avoid the legal force of his contract by so abusing or mistreating his servant that he can no longer remain in service.³ A servant may quit his master where the latter, ignoring his contract of hiring, notifies the servant that he will have to submit to a reduction of wages.⁴ He may do this in such a case without forfeiting his right to recover the wages earned to the time of quitting.⁵ Or he could wait until the end of his period of service before suing and then bring his action for the unpaid wages for the whole time of the contract, less what he might have earned in other work of a like nature.⁶ And the fact that the servant thus improperly discharged promptly seeks other work will not amount to a waiver of his rights nor a rescission of the contract on his part, for this is a duty which the law exacts of him before he will be en-

¹ *Congregation of the Children of Israel v. Peres*, 2 Cold. (Tenn.) 620.

² *Eaken v. Harrison*, 4 McCord (S. C. Law), 249; *Byrd v. Boyd*, 4 McCord (S. C. Law), 141.

³ *Gates v. Davenport*, 29 Barb. 160; *Bishop v. Ranney*, 59 Vt. 316, 7 Atl. Rep. 820.

⁴ *Schietenger v. Bridgeport Knife Co.*, 54 Conn. 64, 5 Atl. Rep. 859.

⁵ *Schietenger v. Bridgeport Knife Co.*, 54 Conn. 64, 5 Atl. Rep. 859.

⁶ *Winship v. Portland League B. B. & A. Ass'n*, '78 Me. 571, 5 Atl. Rep. 706.

titled to recover on his contract for the full time of service.¹ If the servant should acquiesce in the reduction of the wages and continue in the service, however, he could then recover only the reduced amount of compensation, for the acquiescence could amount to nothing less than a waiver of the right to insist on the greater rate of hire.² Where the master after making a contract of service ignores and denies all rights of the servant thereunder, the servant is not bound to remain in the service, but may end the relation and recover a reasonable compensation for any service already performed.³

§ 770. Contract for services for indefinite period — When terminable.— If a servant engages with his master to do work for an indefinite period, there is no particular time at which either will be required to terminate the agreement. Such a contract is necessarily terminable at the will of either party at any time. It cannot be construed to be a contract for life for good behavior or any definite length of time.⁴ And upon a termination by either party, the servant may recover his wages at the contract rate up to the time of quitting or being discharged, as the case may be.⁵ A contract of hiring at an agreed price per month is indefinite as to time, except that it cannot be construed to be effective for less than a month; and it cannot be terminated by either party without the consent of the other except at the end of some month. It is not terminable absolutely at will.⁶ This is just as though the hiring were by the year. If A. should hire B. for a certain price per year, the contract necessarily continues from year to year until notice to the contrary is given, and B. could not be discharged before the end of the first year, nor before the end of any subsequent year, unless another agreement were made or notice of dismissal given.

¹ Van Schaick v. Wannemacher (Pa.), 5 Atl. Rep. 31.

² Spicer v. Earl, 41 Mich. 191, 1 N. W. Rep. 923.

³ Hartman v. Rogers, 69 Cal. 643, 11 Pac. Rep. 581.

⁴ Perry v. Wheeler, 12 Bush (Ky.), 541; Elderton v. Emmens, 4 C. B. 479;

Lord v. Goldberg, 81 Cal. 596, 22 Pac. Rep. 1126; Campbell v. Jimenes, 7 Misc. Rep. 77, 27 N. Y. S. 351.

⁵ Griffin v. Domas, 22 Ill. 203.

⁶ San Antonio & A. P. Ry. Co. v. Sale (Tex. Civ. App.), 31 S. W. Rep. 325.

§ 771. **Period of service — English rule.**—It is laid down by Blackstone that if the master employs a servant and no period of time is agreed upon by the parties as to how long the service is to continue, the law will construe the contract to run for a year. This old idea was based partly upon the fact that at certain times of the year there was little or no need for the servant, and the master was presumed to undertake to keep his servant through the dull part of the year as well as through the more active part when the services would be more valuable and necessary.¹ But even under the old English law, if there was no contract of hiring, and the servant, without any agreement as to pay, performed services for his master which were accepted, a right of recovery for the reasonable value of the services was allowed.² But the presumption of a hiring for a year when no time of service was agreed upon, as laid down by the learned English commentator, is not the law as recognized in this country. Here, generally speaking, a contract for the hire of a servant which is silent as to the time of service would be a contract terminable at the will of either the master or servant, though when the character of the service undertaken is of such a manifestly permanent nature as to imply a continuation of the service for a greater time than a year, and the wages are to be paid on an annual basis, it is held both in this country and England that such a contract necessarily has the effect of an engagement by the year, and the servant cannot be discharged without his consent, nor can he quit the service of the master without the consent of the latter, except at the end of the year.³

§ 772. **Payment in instalments — Hiring by the year.**—Where a servant is engaged to his master for a year, he must of course work this long and the master must keep him for the

¹ 1 Bl. Comm. 425. And *vide* Bayley v. Rimmell, 1 M. & W. 506.

² Bayley v. Rimmell, 1 M. & W. 506.

³ Iron Factory Co. v. Richardson, 5 N. H. 294; Huntingdon v. Claffin, 38 N. Y. 182; Smith v. Velie, 60 N. Y. 106, 110; Adams v. Fitzpatrick, 125 N. Y. 124, 26 N. E. Rep. 143; Bleeker v. Johnson, 50 How. Pr. 380; Vail v.

Manufacturing Co., 32 Barb. 564; Hodge v. Newton, 14 Daly, 372; Wallace v. Devlin, 36 Hun, 275; Mansfield v. Scott, 1 C. & F. 318; Beeston v. Collyer, 4 Bing. 309; Collins v. Price, 5 Bing. 132; Grover & B. Sewing Machine Co. v. Bulkley, 48 Ill. 192; Tatterson v. Suffolk Mfg. Co., 106 Mass. 56.

same period; at least he must pay for such length of time. And the fact that the servant is to be paid weekly, monthly, quarterly, etc., is not inconsistent with an annual or yearly hiring.¹ So, where the master engaged his servant at one hundred dollars per month, and agreed to increase his wages if he gave satisfaction at the end of the year, this was held to be a hiring for the year or by the year.² And a contract by a servant to serve his master for a period of years at an agreed price per month is severable, and the wages are due and payable at the end of every month; and if not then paid may be recovered by an appropriate action.³ Where a servant enters upon employment under a contract to be paid a certain amount per year in monthly instalments, and works more than a year, but is discharged before the end of the second year, it was held that whether the employment was by the year was a question of fact.⁴ Other courts hold, however, and the weight of authority doubtless is, that when a servant engages for a year, and at the expiration of such year continues the service as before without objection on the part of the master, or any notice from him that there will be no more hiring for a year, the law presumes an employment for another full year.⁵

§ 773. Hiring by year — Payment in instalments — Rights of the parties.—When the servant engages to the master for a year, he has a right to work the full term. The fact that the wages are to be paid in instalments does not divide up the contract. A contract for a year, for instance, is a whole contract, though the wages are to be paid monthly or otherwise in instalments.⁶ But where, by the terms of the contract of employment, the servant is to be paid per month at the rate of a

¹ King v. Birdbrooke, 4 T. R. 245; Fawcett v. Cash, 5 Barn. & Ad. 908; Norton v. Cowell, 65 Md. 359, 4 Atl. Rep. 408.

² Norton v. Cowell, 65 Md. 359, 4 Atl. Rep. 408.

³ Clay Commercial Telephone Co. v. Root (Pa.), 4 Atl. Rep. 828.

⁴ Tallon v. Grand Portage Copper Mining Co., 55 Mich. 147, 20 N. W. Rep. 878; Fawcett v. Cash, 5 Barn. & Ad. 904.

⁵ Wallace v. Floyd, 29 Pa. St. 184; Huntington v. Clain, 38 N. Y. 182; Vail v. Manufacturing Co., 32 Barb. 564; Wood, Master & S., § 96; McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 Atl. Rep. 176; Hodge v. Newton, 14 Daly, 372; Wallace v. Devlin, 36 Hun, 275.

⁶ Larkin v. Hecksher, 51 N. J. Law, 133, 16 Atl. Rep. 702.

certain sum per year, the contract will be construed to be from month to month and not by the year.¹ So, too, if the contract of service provide that the servant shall be paid a named price per month for his work, but no length of time is stated, the master may discharge him at the end of the first or any subsequent month, and pay him accordingly.²

§ 774. Wages — Absence of express contract — Presumptions — Measure of recovery.— Where a servant renders services to the master which are accepted, though there be no express agreement that the servant is to receive pay, yet the law presumes that the master intends to pay and the servant to receive a reasonable compensation for his work, as it is not to be presumed that the servant means to give his time and work to the master unless the character of the service be such as to amount to a mere voluntary undertaking.³ In such cases the servant will have the right to recover what his services are properly worth.⁴ Where, however, the servant thus working without any express agreement as to pay receives compensation in food, clothing, medical attention and spending-money, with which he is satisfied as pay, he cannot recover on a *quantum meruit* or otherwise for any additional compensation.⁵

§ 775. Right of servant to terminate the relation.— When a servant undertakes to serve his master for a certain and definite time, it is his duty to serve for the full time undertaken. He may not quit without a lawful excuse except by forfeiting the right to recover for the time he has served. To be lawful, of course, this excuse must be such as to properly justify the servant in leaving. It must, generally speaking, be grounded in the fault of the master, and this must be such as to make a further continuance in the service impracticable. The servant may not quit by reason of any trivial thing which may transpire not entirely to his taste. It has been held, therefore, that

¹ Pinckney v. Talmage, 82 S. C. 364, 10 S. E. Rep. 1083.

² Magarahan v. Wright, 83 Ga. 773, 10 S. E. Rep. 584.

³ Chipley v. Atkinson (Fla.), 1 S. Rep. 934.

⁴ Tucker v. Preston, 60 Vt. 473, 11

Atl. Rep. 727; Stanley v. Barringer, 74 Iowa, 84, 36 N. W. Rep. 877; Simonson v. Simonson, 53 Hun, 634, 6 N. Y. S. 130; McKee v. Vincent, 33 Minn.

508.

⁵ Stanley v. Barringer, 74 Iowa, 84, 36 N. W. Rep. 877.

the servant has no right to quit because of a disagreement or misunderstanding between himself and a fellow-servant.¹ In such a case it will be the duty of the servant to report the misconduct of his fellow, if it be such that it might render his further service dangerous. Upon receiving this information the master would have to discharge the guilty servant if his method of discharging his duty is such as to unnecessarily or improperly endanger the other servant, and if he should fail to do so the aggrieved servant might quit and claim his wages for the full time of service, less anything he could earn at other like work by due diligence. But a servant would not have a right to quit merely because of rough language used towards him by the master.² While this may be true, however, as to a single or perhaps an occasional use of improper language to the servant, yet it is easy to conceive a case in which the servant might quit his master because of ill treatment, though consisting only of words. For instance, the language might be so profane, insulting or threatening as to keep the servant in constant fear or humiliation, or justly arouse his anger or indignation. And when the misconduct of the master, though only by words, is carried to this extent, nothing seems plainer or more reasonable than that the servant may terminate his relation and rely on his right to full compensation.

§ 776. Wages payable in instalments — Right of servant to recover.— When, by the contract of service, the compensation for the work is to be made in instalments at stated times, the servant will have a right of action against the master for each instalment of wages as the same may fall due under the contract; and upon a refusal of the master to pay them as they accrue, the servant will have his right of action to enforce the payment.³ He could recover on any instalments which were due at the time of suit, though he could sue as soon as the first became due and as often as subsequent ones matured. Of course he could wait until they all fell due, should he see fit, and then sue for the whole amount. But suing to recover wages by in-

¹ Aaron v. Moore, 24 Mo. 79.

² Marsh v. Ruleson, 1 Wend. 515.

³ Strauss v. Meertief, 64 Ala. 299; Gandell v. Pontigny, 4 Camp. N. P.

375; Thompson v. Wood, 1 Hilt. 93;

Markham v. Markham, 110 N. C. 356,

14 S. E. Rep. 963.

instalments is inconsistent with the idea of a breach of contract on the part of the master in improperly discharging the servant. And an action by the servant for a breach of the contract and damages arising therefrom will preclude any right of recovery on the contract by instalments as they fall due, or for all the instalments when they all become due. It is necessary, therefore, that the servant who has been improperly discharged, and who wishes to collect his wages in instalments, treat the contract as continuing and not as rescinded.¹ For if he should elect to treat the contract as broken, and sue for the damages caused thereby, a recovery in such an action would be a bar to any right of recovery on any or all of the instalments.² Of course the fact that the wages of a servant are payable in instalments is no excuse for the servant to remain idle after an improper discharge. If he be employed for two months, the wages to be paid at the expiration of the time of service, and the master improperly discharges the servant at the end of one month, it would be the duty of the servant to use proper diligence to find work for the remainder of the contract period. And if he should succeed in so doing, the amount earned would have to be deducted from his total wages according to the whole contract, and for which an action could then be maintained less the amount earned.

§ 777. Contract for wages — Implied agreement — Question of fact.— Where one engages to another at a specified rate of compensation for domestic services, there is, of course, a legal liability for such service. But if the servant continues in the service of the master beyond the term of employment without any further agreement, rendering the same services, there can be no express agreement, but the recovery, if it can be had, must be upon the theory of an implied contract. And if the circumstances of the case are such as to make it doubtful whether the parties expected to pay and receive compensation for the service, the question will resolve itself into one of fact.³ And where a servant quits his master before the expiration of his period of service, it has been held — perhaps with question-

¹ *Lichtenstein v. Brooks*, 75 Tex. 44 Ohio St. 226, 6 N. E. Rep. 246; 196, 12 S. W. Rep. 975.

Thompson v. Wood, 1 Hilt. 93.

² *James v. Board of Commissioners*,

³ *Neale v. Engle* (Pa.), 7 Atl. Rep. 60.

able propriety — that slight evidence will suffice to support the fact that the employer agreed to apportion the wages for the time the servant actually worked.¹ But in any event the recovery must not exceed the contract price.²

§ 778. Liability of master for wages of servant — Voluntary services.— The liability of the master for the value of the services of one whom he employs arises by operation of law upon contract, either express or implied. In order, therefore, that the servant may properly ground an action to recover for domestic or other services, he must prove by affirmative testimony the relation of master and servant, which, as a rule, cannot exist except by virtue of a contract of some kind. So if one renders services to another without his request or sanction, there is no liability to the servant therefor, because such a person is merely a stranger, a volunteer, and, in a sense, an intermeddler.³ There must be either a previous authorization of the services, express or implied, or an assent or sanction of some kind given by the master after the service is done, or while it is being done, with knowledge that it will be continued; or before, with the knowledge that it is intended or contemplated. And when this is the case, a recovery for the value of the services may be had.⁴ Upon this principle an infant who lives with her step-parents during minority will not be entitled to pay for any domestic services she may render them after attaining her majority, without proof of a contract; and the mere fact that such parent stands to her in *in loco parentis* will not imply a promise on his part to pay for such services.⁵ Where A. pays a debt of B., without the request or knowledge of B., there is no liability of B. to A. for this act, and the simple fact that B., upon ascertaining what A. had done, asked him why he did so, does not amount to a ratification of the act nor an authoriza-

¹ Hogan v. Tilton, 14 Cal. 255.

² Morford v. Ambrose, 3 J. J. Marsh. (Ky.) 688.

³ Watkins v. Richmond College, 41 Mo. 302; Alton v. Mulledy, 21 Ill. 76.

⁴ Kent Furniture Mfg. Co. v. Ransom, 46 Mich. 416, 9 N. W. Rep. 454; Allen v. Mulledy, 21 Ill. 76; McBride v. Grand Rapids, 47 Mich. 236, 10 N.

W. Rep. 353. As illustrating this principle, see also Child v. Morley, 8 T. R. 610, 613; Young v. Pillow, 7 Humph. (Tenn.) 270; Rensselaer Glass Factory v. Reid, 5 Cowen, 587; Jones v. Wilson, 3 Johns. 434; Bailey v. Gibbs, 9 Mo. 44; Stokes v. Lewis, 1 T. R. 20.

⁵ Lantz v. Frey, 14 Pa. St. 201.

tion.¹ And this rule is applied with special force when the work is done against the express request of the master, however beneficial it may be to him in point of fact.² But where services have been rendered any one, there is no presumption that they were either gratuitous or voluntary, and in an action for the value thereof the master must show that the services are voluntary by affirmative proof, else he will not be permitted to defeat an action for the value.³

§ 779. Contract of service — Amount of compensation.— When the master engages a servant and no specified amount is agreed upon, but this is left to the master to name, it has been held that the naming of the wages by the master is conclusive, even though this be less than the services are worth.⁴ But the better rule seems to be that in such cases the master undertakes impliedly to pay what the services are worth; that such an agreement amounts to an implied undertaking to do this, and that the master has no right to arbitrarily fix an amount less than the reasonable and proper value.⁵ This ruling seems to be more in harmony with common sense. The measure of recovery should be the value of the services, and this will generally be a question of fact. The master upon every just principle should forfeit his right to fix the rate of compensation when, wielding this power with a view to his own unjust profit and an injury to his confiding servant, he arbitrarily fixes a rate of compensation grossly or palpably inadequate. It is clear the servant would not undertake the service upon such a contract if he thought the master would thus act. It seems very clear, therefore, that the proper interpretation of such an agreement is, the master expects to pay and the servant to receive what is fair and proper for the service, and that they mutually contract with this implied understanding.

§ 780. Period of service — Necessity for full performance. The master may, of course, engage his servant for a specified time, when both will be required to abide by the contract; or

¹ Winsor v. Savager, 9 Metc. (Mass.) 346.

² Stokes v. Lewis, 1 T. R. 20.

³ Kelly v. Houghton, 50 Wis. 400, 18 N. W. Rep. 326.

⁴ Butler v. Winona Mill Co., 28 Minn. 205, 9 N. W. Rep. 697.

⁵ Millar v. Cuddy, 43 Mich. 273, 5 N.

he may engage him for an indefinite time, under which arrangement either could terminate the relation at pleasure.¹ Where a servant hires to his master for a definite time, however, but quits the service before the expiration of the period, he will not be entitled to recover any wages for the time he served before quitting, where, of course, the master is not at fault. In such a case the servant has not performed his agreement; he has not served as he agreed to do; the master has been deprived of the service he engaged and had a right to expect. The performance of the contract is a condition precedent to his right to pay, and, not performing it according to agreement, he forfeits the right to recover.² The theory that a servant who does work for his master under an entire contract, whereby a material advantage or benefit inures to the master, though the servant quits the service before the expiration of the time for which he engaged without the consent of his master, is deprived of any right of recovery, is denied in Vermont.³

¹ Wright v. Morris, 15 Ark. 444; Haney v. Caldwell, 35 Ark. 156.

² Marsh v. Rulesson, 1 Wend. 514; Reab v. Moor, 19 Johns. 337; Davis v. Maxwell, 12 Metc. (Mass.) 286; Stark v. Parker, 2 Pick. (Mass.) 266; Jennings v. Camp, 18 Johns. 94; McMillan v. Vanderlip, 12 Johns. 165; Sedgwick v. Rowe, 2 Gilm. (Ill.) 91; Coe v. Smith, 1 Ind. 267; Ellis v. Hanlen, 3 Taunt. 52; Olmstead v. Beale, 19 Pick. (Mass.) 528; Cox v. Adams, 1 Nott & McC. (S. C. Law), 284; Hawkins v. Gilbert, 19 Ala. 54; Swanzey v. Moore, 22 Ill. 63; Rice v. Dwight Mfg. Co., 2 Cush. (Mass.) 80; Allen v. McKibbin, 5 Mich. 449; Lantry v. Parks, 8 Cowen, 63; Faxon v. Mansfield, 2 Mass. 147; Gates v. Davenport, 29 Barb. 160; Congregation of the Children of Israel v. Peres, 2 Cold. (Tenn.) 620; 2 Kent. Comm. 258; Libhart v. Wood, 1 W. & S. (Pa.) 265; Monell v. Burns, 4 Denio, 121; Caldwell v. Dickson, 17 Mo. 575; Diefenback v. Stark, 56 Wis. 462, 14 N. W. Rep. 621; Sickels v. Pattison, 14 Cowen, 257; Banse v. Tate, 62 Mo.

App. 150; Larkin v. Buck, 11 Ohio St. 561; Greene v. Linton, 7 Porter (Ala.), 133; Hutchinson v. Witmore, 2 Cal. 810; Henderhew v. Cook, 66 Barb. 21; Patnate v. Sanders, 41 Vt. 66; Clark v. Gilbert, 26 N. Y. 279; Whittey v. Murray, 34 Ala. 155; Henderson v. Stiles, 14 Ga. 135; Webb v. Duckingfield, 13 Johns. 390; Preston v. American Linen Co., 119 Mass. 400; Hogan v. Tetlow, 14 Cal. 255; Posey v. Garth, 7 Mo. 94; Schnerr v. Lemp, 19 Mo. 40; Hinson v. Hampton, 32 Mo. 408; Ewing v. Ingram, 24 N. J. Law, 520; Green v. Gilbert, 21 Wis. 395; Wolfe v. Howes, 20 N. Y. 197; Aaron v. Moore, 34 Mo. 79; Mack v. Bragg, 30 Vt. 571; Ripley v. Chipman, 13 Vt. 268; Codey v. Raymond, 1 Colo. 272; Koplitz v. Powell, 56 Wis. 671, 14 N. W. Rep. 831; Kahn v. Faendel, 29 Minn. 470, 13 N. W. Rep. 904; Nelichka v. Hieneman, 29 Minn. 146, 12 N. W. Rep. 457; Turner v. Robinsons, 6 Car. & P. 15.

³ Fenton v. Clark, 11 Vt. 557. The weight and force of this case are very materially weakened, however,

Some courts, perhaps, may have felt the hardship of some cases in denying the general rule. The servant may work until the very day before his contract expires, and then quit. He engaged to work, also, that other day. His contract was entire; he was to work the whole period. But it is manifest that the master cannot be very seriously injured by the loss of a single day when the contract is of anything like long duration. He has, in such a case, received practically all the benefit he could expect from the services. Some hardships must necessarily occur; but a wholesome rule should not be made to give place to some hardships which must necessarily occur in the uniform and equal administration of the law. The idea of a right of recovery upon a *quantum meruit* must necessarily rest upon an implied contract to pay. In the nature of things, the law never implies a contract when an express agreement exists. This would be absurd. Such a rule would permit the servant to renounce his express contract at pleasure, and sue upon an implied one for the time he worked, though he may have violated his express contract in wrongfully refusing to serve his master according to agreement. He might thus be enabled to quit when it would be most disastrous to his master, and yet recover full value for the services performed. The master may have in view many valuable plans which could be carried out if the servant worked his full time according to contract, and it might be impossible to mature these if he could not depend upon the binding force of the entire contract with his servant for a full specified time. Of course, if the master should accept the services rendered, there is some reason in allowing a *quantum meruit*. But this rule obtains, generally, only in certain kinds of service, and relates rather to such service as the performance of some particular amount or character of work, as, for instance, the building of a house, or the performance of other like service. If a person should employ another to build a house, and he should nearly complete it and then quit, it would be equitable to allow him

by a very vigorous and logical dissenting opinion of the illustrious Judge Redfield, in which he vindicates the contrary doctrine with masterly ability. Sanction seems to be given to the theory of the right to recover a *quantum meruit* in other states. *George v. Elliott*, 2 Hen. & Munf. (Va.) 5. And see, too, *Byrd v. Boyd*, 4 McCord (S. C. Law), 246.

a reasonable compensation where the master utilized the building as thus nearly completed.¹ There is some difficulty, however, in applying this principle to domestic service. The master cannot tell what instant his servant will leave him. The service is of such a nature that the master necessarily accepts it, in a sense, as it is performed, for he cannot know when the servant is going to abandon him, and he has the right, moreover, to presume that the servant will carry out his contract, and, in accepting the service as it progresses, it is naturally upon the idea that the servant will complete his contract, a presumption the master certainly has the right to indulge, and in indulging it should not be prejudiced nor required, upon an arbitrary abandonment of the service by the servant before the expiration of the time of the contract, to respond for the value of services then rendered. If the master should refuse to permit the servant to complete the contract, for fear the servant would not continue in the service the full period, he would be liable to the servant for the full time, and all the servant would have to do to entitle him to his full pay would be to endeavor to get other like work for the remainder of the time, and, failing in this, to hold himself in readiness to serve out the time. It is argued sometimes that the rule of non-liability in case of a refusal to perform a contract of service operates as an injustice to the servant, because it would be in the power of the master to make his situation so unpleasant towards the expiration of the contract that he would be indirectly forced to leave, and thereby forfeit the right to receive compensation for the full period of service. But this argument works both ways; for, if the master can thus indirectly force his servant to leave, the servant likewise, whenever his pleasure or caprice might prompt him to quit, could make himself so worthless and disagreeable to the master that the latter would have to discharge him; whereupon the servant would become entitled to the value of his services, not exceeding the contract price, to the time of discharge, and this the master

¹ See, as instructive on this point and as sustaining this theory, *Allen v. McKibbin*, 5 Mich. 449; *Britton v. Turner*, 6 Vt. 481; *Hayward v. Leonard*, 7 Pick. (Mass.) 181; *Byrd v. Boyd*, 4 McCord (S. C. Law), 246; *Hawkins v. Gilbert*, 19 Ala. 54; *Merriweather v. Taylor*, 15 Ala. 735; 2 Greenl. Ev., § 104; *Thomas v. Ellis*, 4 Ala. 108.

would have to pay, as well as submit to any inconvenience incident to the loss of services. And in any event, if the conduct of either the master or servant be such as to render the relation intolerable, or to materially injure the one or the other in his name, business, purse or estate, the injured one may terminate the relation.¹

§ 781. **Wages — Continuation of service.**—Where a servant engages with his master to perform a certain kind of work for a named period at an agreed compensation, and continues to perform the same or like service after the period of time for which he was specifically employed without any further agreement with the master for future compensation, the presumption is the master intends to pay him the same price as long as he serves at the same work.² But this presumption only obtains when the servant continues a similar or the same service. If, after the expiration of the contract of service, he engage in a different kind, there is no presumption that he is to receive the same wages, and, before he will be entitled to do so, he will have to assume the burden of proof and show that there was a contract, either express or implied, that he was to receive the same compensation.³ As was well said by the supreme court of Arkansas in *Ewing v. Janson*:⁴ “The presumption depends upon a continuance of the same character of service, and would be contrary to reason if it applied where the character of the service was altered. If one should complete his term of service as a carpenter and continue service as a plowman or a teamster, there would be no reason to pre-

¹ *Lacy v. Asbaldiston*, 8 Car. & P. 80; *Libhart v. Wood*, 1 Watts & S. (Pa.) 265; *Mathews v. Park Bros.*, 146 Pa. St. 384, 392, 23 Atl. Rep. 208; *Singer v. McCormick*, 4 Watts & S. (Pa.) 265; *Kearney v. Holmes*, 6 La. Ann. 373; *Armor v. Fearon*, 9 Ad. & E. 548; *Turner v. Mason*, 14 M. & W. 112.

² *Vail v. Jersey Little Falls M. Co.*, 32 Barb. 564; *Grover & Baker Sewing Machine Co. v. Bulkley*, 48 Ill. 189; *Bacon v. Home Sewing Machine Co.*, 59 Hun, 624, 13 N. Y. S. 359; *Ranck v. Allbright*, 36 Pa. St. 367;

Huntington v. Claffin, 38 N. Y. 182; *Ewing v. Janson*, 57 Ark. 237, 27 S. W. Rep. 430; *Nicholson v. Patchin*, 5 Cal. 474; *Adams v. Fitzpatrick*, 125 N. Y. 124, 26 N. E. Rep. 143; *Factory Co. v. Richardson*, 5 N. H. 294; *Standard Oil Co. v. Gilbert*, 84 Ga. 714, 11 S. E. Rep. 491; *Douglass v. Merchants' Ins. Co.*, 118 N. Y. 484, 23 N. E. Rep. 806; *Tatterson v. Manufacturing Co.*, 106 Mass. 56.

³ *Ingalls v. Allen*, 133 Ill. 174, 23 N. E. Rep. 1026; *Ranck v. Allbright*, 36 Pa. St. 367.

⁴ 57 Ark. 237, 240, 21 S. W. Rep. 430.

sume that the parties understood he was to receive the same rate of compensation, and we are aware of no authority to support such a principle."

§ 782. **Dissolution of the relation — Death.**— The death of one or both of the parties to a contract, whether for services as between master and servant, or generally between others, operates *ipso facto* to dissolve the relation of master and servant. When, therefore, the death of the master or servant takes place during the time the contract of service is to run, the relation at once ceases, and with it, generally, all duties arising thereunder.¹ The contract of master and servant is in its nature personal. The master engages the personal services of the servant, not those of a substitute whom the servant may engage in his stead, or who, after the death of the servant, may offer to carry out the original contract, though the person offering to substitute himself be eminently fit to perform the work undertaken by the other. On the other hand, the servant agrees to serve the master personally, not another whom the master may offer as a substitute, nor his administrators or other legal representatives. The general rule, therefore, is, the death of either the master or servant, before the expiration of the contract of service, places the survivor in the very position thereafter he would occupy had the contract never been made.² Of course if there be any covenants in the contract of service which would necessarily bind the estate or legal representatives of the survivor, these may be enforced according to their tenor after the death of one of the parties,³ otherwise the servant can recover no wages for any time after the death of the master. This is true even though he continues the service under the direction of the master's widow.⁴ When the master is a member of a firm by which the servant is employed, the death of the master dissolves the partnership and ends all

¹ Wolfe v. Howes, 20 N. Y. 197; Harris v. Johnson, 98 Ga. 434, 25 S. E. Rep. 525; Rex v. Peck, 1 Salk. 66; Cochran v. Davis, 5 Litt. (Ky.) 118; Eastman v. Chapman, 1 Day (Conn.), 30; Lacy v. Getman, 119 N. Y. 109, 23 N. E. Rep. 452; Clark v. Gilbert, 32 Barb. 576.

² King & Queen v. Prat, 12 Mod. 27; Baxter v. Burfield, 2 Str. 1266.

³ Eastman v. Chapman, 1 Day (Conn.), 30; King & Queen v. Prat, 12 Mod. 27; Cochran v. Davis, 5 Litt. (Ky.) 118.

⁴ Lacy v. Getman, 119 N. Y. 109, 23 N. E. Rep. 452.

contractual relations between the servant and the firm.¹ A firm cannot exist without all the partners; the death of one dissolves it by operation of law, and the partnership being thus ended by law there is no master for the servant to serve. But dissolution of the contract by the act of God cannot be charged to the servant. This being the case, it is deemed but right, equitable and proper that the legal representatives of the servant have a right of action against the master for a proper proportion of the wages for the time he has worked.² In such case the legal representatives will not be permitted to recover more than the amount earned to the time of death, or the sickness disabling the servant from work and resulting in death, according to the contract price.³ And the right of the legal representatives to recover for the services performed to the time of sickness or death, as the case may be, cannot be upheld upon the ground of the contract of service, but upon the right to recover a *quantum meruit* for the value of the services rendered; for the contract of service has not been complied with, and therefore cannot be taken as the basis of a right of action. But the service has been performed at the request and with the consent of the master, and he is liable for the service rendered, on the theory that the law implies an intention on the part of the master to pay a reasonable worth for services which he requests and accepts.⁴ And in suing on a cause of action of this kind it is not necessary for the plaintiff to allege in his pleadings the reason the contract could not be performed. It is incumbent on the defendant to show that it could have been carried out if he can do so.⁵

§ 783. Contract of employment—Sickness of servant.—

In the nature of things it cannot be expected or required that one pay for that which he does not receive and as to which he is in no fault. The sickness of a servant, when of such a type as to disable him from performing his contractual duties

¹ *Louis v. Elfelt*, 89 Cal. 547, 26 Pac. Rep. 1095; *Mason v. Secor*, 76 Hun, 178, 27 N. Y. S. 570. *Coe v. Smith*, 4 Ind. 79; *Clark v. Gilbert*, 26 N. Y. 279.

² *Clark v. Gilbert*, 26 N. Y. 279, 283; *Coe v. Smith*, 4 Ind. 79. ⁴ *Greene v. Gilbert*, 21 Wis. 401; *Wolfe v. Howes*, 20 N. Y. 197.

³ *Allen v. McKibbin*, 5 Mich. 449; ⁵ *Wolfe v. Howes*, 20 N. Y. 197.

to his master, would no doubt absolve him from any liabilities for a breach of contract, for his sickness may be said to be the act of God; at least it cannot ordinarily be either foreseen or forestalled; and the servant who is prevented from discharging his duties to his master by reason of sickness is really guilty of no legal or moral dereliction of duty. But while this is the case, the master is not at fault, and without his fault he has been deprived of the services of his servant. The rule, therefore, is, when the sickness of the servant is such as to materially cut off his usefulness, to the injury of the master, the master will only be required in law to pay him for such time as he was employed, less the damages accruing by reason of the inability of the servant to perform his contract.¹ If the contract of service be for a certain time and absolute, the performance of which for the full period is a condition precedent, the servant cannot recover anything for his work unless he works the full time, and his sickness for a material part of the time which disables him from performing it is no excuse in law for a failure to carry out the whole contract.² The same rule applies if the servant die before the performance of the contract or it is otherwise prevented by the act of God;³ though in such a case there would be no right of action in the master against the estate of his deceased servant for any injury resulting to him by reason of the failure of the servant to perform the service according to contract.⁴ Any occurrence, not the fault of the master, which prevents the servant from fully performing his entire and indivisible contract, will defeat his right of action for the whole or any part of his wages on a contractual basis.⁵

¹ *Greene v. Linton*, 7 Porter (Ala.), 133; *Hunter v. Waldron*, 7 Ala. (N. S.) 753; *Seaver v. Morse*, 20 Vt. 620; *Hubbard v. Beldin*, 27 Vt. 645; *Ryan v. Dayton*, 25 Conn. 188.

² *Greene v. Linton*, 7 Porter (Ala.), 133; *Givhan v. Dailey's Adm'r*, 4 Ala. (N. S.) 336.

³ *Givhan v. Dailey's Adm'r*, 4 Ala. (N. S.) 336; *Cutter v. Powell*, 6 T. R. 320; *Maryon v. Carter*, 4 Car. & P. 295; *Gibbon v. Mendez*, 2 B. & A. 17.

⁴ *Givhan v. Dailey's Adm'r*, 4 Ala. (N. S.) 336.

⁵ *Appleby v. Dods*, 8 East, 300; *Countess of Plymouth v. Throgmorton*, 1 Salk. 65; *Hulle v. Heightman*, 2 East, 145; *Norris v. Moore*, 3 Ala. (N. S.) 676; *Pettigrew v. Bishop*, 3 Ala. (N. S.) 440; *Brumley v. Smith*, 3 Ala. (N. S.) 123; *Rounds v. Baxter*, 4 Greenl. (Me.) 454; *Hair v. Bell*, 6 Vt. 35; *Philbrook v. Belknap*, 6 Vt. 383; *Stark v. Parker*, 2 Pick. (Mass.) 267.

§ 784. Sickness of servant — Right of master to discharge. Ordinarily, where the servant becomes temporarily incapacitated from work by slight or trivial sickness, this would not, it would seem, be a valid excuse for discharging him. But where the sickness is such as to seriously injure the master or greatly inconvenience him in his business by reason of its duration, it seems that the servant may be discharged, though the disability to further perform the service according to contract be the act of God. Where, therefore, a servant who was engaged by the year became so sick that he could not, for seven successive weeks, discharge his duty to his master, it was held that the latter was justified in dismissing him.¹ Doubtless where it is difficult to determine whether the master, in view of sickness, would have a right to discharge his servant, would be a question of fact; for all persons must be presumed to contract with the logic of events in view. And as nothing is more common, ordinarily, than the indisposition of a person at some time during a period of a year or even less, a time for which services are often engaged, it would hardly seem that it would have been contemplated that the servant should be thrown out of employment and forfeit his right to further work simply on account of a slight sickness which may disable him from work a short time.

§ 785. Breach of contract by servant — Rights of master. When the master engages his servant there is an implied undertaking on the part of the servant that he is competent to perform in a skilful manner the services undertaken, and the master has the right to rely on the presumption that the servant is competent and will discharge his duties faithfully and efficiently.² So where a servant performs his services in such a reckless or unskilful manner as to injure the master in his property rights or business, the latter will have a right of action against the servant for the damages resulting from such neglect or non-performance of duty.³ And he could of course discharge him for this reason, as such an act would be a breach

¹ *Johnson v. Walker*, 155 Mass. 253, 29 N. E. Rep. 524.

³ *Woodrow v. Hawving*, 105 Ala. 240, 16 S. Rep. 720.

² *Woodrow v. Hawving*, 105 Ala. 240, 16 S. Rep. 720.

of his implied undertaking to serve his master without injury to himself or his property.

§ 786. Period of contract — Breach by infant servant.— An infant who engages to his master to serve for a stipulated time cannot recover from the master for the full period unless he serves out the contract. If he should quit before such time he cannot recover a proportionate part of his agreed wages, for, having violated his contract, he must recover on a *quantum meruit* for the time he has served, as the law requires the master to pay a reasonable price for services he has engaged and accepted.¹ The infant may recover from the master as soon as he arrives at age; and the fact that the infant had no guardian during minority to whom wages might be paid is no defense to such an action.² Of course the measure of recovery, as to the value of the services, is the same where the servant is an infant as where he is an adult.³

§ 787. Contract with infant — Rights of infant.— Where an infant engages himself to a master to do certain work for a stated time and at a stipulated price, and at the expiration of the period of service the master pays him according to agreement, and the transaction is fair and free from fraud, the infant will not thereafter be allowed to repudiate the contract, sue for the value of services and recover again, as this would be inequitable and unjust to the master.⁴ If the infant should disregard the contract in the first instance without payment from the master and sue for the value of his services he could recover no more than a fair price. And as he has received this, there can be but little reason for permitting him to again sue and recover without performing any additional or other services. But if the minor should have a parent living, and he is not emancipated, the payment of the wages by the master to the infant would not preclude the right of recovery in the parent for the value of the services of the infant unless such parent had agreed that the master might pay the wages to the infant,

¹ *Hagerty v. Nashua Lock Co.*, 62 N. Pac. Rep. 581; *Cox v. McLaughlin*, H. 576. 76 Cal. 60, 18 Pac. Rep. 100.

² *Gates v. Davenport*, 29 Barb. 160.

⁴ *Murphy v. Johnson*, 45 Iowa, 57.

³ *Given v. Charron*, 15 Md. 502; See, however, *Childs v. Dobbins*, 55 Hartman v. Rogers, 69 Cal. 643, 11 Iowa, 205, 7 N. W. Rep. 532.

in which case a payment to the infant would be an acquittance.¹ If the infant should have no parent, the safest way is to make payment to his guardian and take an acquittance from such representative. If the master should improperly dismiss his infant servant or otherwise violate the contract on his part, a cause of action would accrue to the servant for the breach.² And the fact that the contract was made with the parent of the infant servant will not alter the rule.³

§ 788. **Time of payment for services.**—When the contract of employment is silent as to when payment is to be made, the presumption of law is, it is not to be made until the end of the time for which the employment is undertaken. Consequently, in such cases, no recovery can be had before the end of the time.⁴

§ 789. **Contract of service — Statute of frauds.**—A parol contract of service which is not to be performed within a year from the time of making the agreement cannot be enforced, because within the statute of frauds, which requires all such contracts to be evidenced by some writing signed by the party to be charged.⁵ An agreement of the master to pay his servant for services at the rate of a specified amount per annum is not within the statute of frauds, for there is no hiring for more than a year, and the contract may be performed within a year, though it may also extend through a longer period.⁶ But an agreement to pay the servant a designated sum per week, month, etc., for the period of two years or other time longer than one year, is within the statute. For, while the payments may be in instalments by the terms of the contract, yet these instalments do not represent the period of the contract, but simply designate a time of payment and rate of wages, not the

¹ White v. Henry, 24 Me. 531.

² Gooden v. Rayl, 85 Iowa, 592, 52 N. W. Rep. 506.

³ Strong v. Marcy, 33 Kan. 109, 5 Pac. Rep. 356; Gooden v. Rayl, 85 Iowa, 592, 52 N. W. Rep. 506.

⁴ Thayer v. Wardsworth, 19 Pick. (Mass.) 349; Tebo v. Ballard, 36 Vt. 612.

⁵ Bracegirdle v. Herald, 1 Barn. &

Ald. 722; Tuttle v. Sweet, 31 Me. 555;

Hill v. Hooper, 1 Gray (Mass.), 131;

Meyer v. Roberts, 46 Ark. 80; Cohen

v. Stein, 61 Wis. 508, 21 N. W. Rep.

515; Wilkinson v. Heavenrich, 58

Mich. 574, 26 N. W. Rep. 139; Hack v.

Bragg, 30 Vt. 571; Swanzey v. Moore,

22 Ill. 63; Kelly v. Terrell, 26 Ga. 551.

⁶ Prentiss v. Ledyard, 28 Wis. 181;

Haney v. Caldwell, 85 Ark. 156.

time in which the whole contract may be performed.¹ Though a contract of service is not enforceable because within the statute of frauds, yet if the servant undertakes the service, but quits before the end of the time he was to serve, he will not be entitled to recover for the service he has performed to the time of quitting.² But if the servant enter upon his duties on a contract invalid because of the statute of frauds and is afterwards discharged by the master without good cause, the master will be liable to the servant for the value of his service for the full time he worked.³ And where the servant enters the employment under a contract void because of the statute of frauds, and duly performs the same on his part, he will be entitled to recover from his master the actual value of the services rendered.⁴ This right of recovery is not by virtue of the contract, for this cannot be enforced. It rests upon the implied promise to pay value for services which one renders at the request of another, and the measure of recovery is limited to the actual value of the services, whether greater or less than the contract price.

§ 790. Void contracts — Right of servant to recover.— When a servant engages to his master under a contract which cannot be enforced, the master is liable to the servant for the actual value of the services. These he has requested and received; and it would be unconscionable to permit him to receive the benefit of them and at the same time relieve himself of the duty of paying actual value therefor. He is deemed liable in law, therefore, for the actual fair and reasonable value of the services and no more.⁵ This rule applies to contracts void because within the statute of frauds.⁶ Likewise where the contract cannot be enforced because entered into on Sunday.⁷

§ 791. Right of master to recover from servant for failing to perform contract of service.— When the servant improperly quits the service of his master, the latter has a right of

¹ Hill v. Hooper, 1 Gray (Mass.), 131; N. W. Rep. 45; Cole v. Clark, 3 Wis. Tuttle v. Sweet, 31 Me. 555. 323.

² Mack v. Bragg, 30 Vt. 571.

³ Swanzey v. Moore, 22 Ill. 63; Meyer v. Roberts, 46 Ark. 80. ⁶ Cohen v. Stein, 61 Wis. 508, 21 N. W. Rep. 514; Salb v. Campbell, 65 Wis. 405, 27 N. W. Rep. 45.

⁴ Van Horn v. Van Horn (N. J. Eq.), 20 Atl. Rep. 826.

⁷ Spahn v. Willman (Del.), 39 Atl. Rep. 787.

⁵ Salb v. Campbell, 65 Wis. 405, 27

action against him for the proper and legitimate damages arising from the failure to discharge his duties.¹ The master may avail himself of this right by a counter-claim or set-off in an action by the servant for any wages that may be due him; and if such damages are in excess of the amount of wages recoverable, he may have judgment against the servant for the excess.² But in order to entitle a master to recover damages from a servant for a breach of the contract of service in improperly quitting before the end of the contract period, the master must use reasonable diligence to get other help in order to reduce the damages recoverable to a minimum, just as the servant, upon being improperly discharged, must endeavor in good faith to get like work elsewhere for the remainder of the contract period.³ If, at the time the servant quits his master, he has been overpaid by the latter, the master may recover from the servant any overpayment of wages thus made as well as, and in addition to, any other legitimate damages arising from the improper or wrongful acts of the servant.⁴

§ 792. Master and servant — Contract of employment — Sunday work.— There is no implied undertaking in a contract of service for a period of time in which is necessarily included one or more Sundays that the servant will work on Sunday. This is especially true when the working on this day would be a violation of the law.⁵ It is true that some little work, such as is always necessary on Sunday as well as on other days, and the doing of which is not forbidden by law because of the necessity which excuses it, may be required; but, as a general rule, a contract of employment between a master and servant will not be held to include work, in a regular way, on Sunday. Work on this day is usually confined to service of a domestic nature. On the other hand, the employment of a seaman or railroad servant, such as engineer, conductor or like servant, in service such as is generally regarded as necessary to be done on Sunday, would not preclude the idea of Sunday service but would rather include it.

¹ Harlan v. St. Paul, M. & M. Ry. Co., 31 Minn. 427, 18 N. W. Rep. 147.

² Harlan v. St. Paul, M. & M. Ry. Co., 31 Minn. 447, 18 N. W. Rep. 147; South Chicago City Ry. Co. v. Workman, 64 Ill. App. 383.

³ Fuqua v. Massie (Ky.), 37 S. W. Rep. 587.

⁴ Singer v. McCormick, 4 Watts & S. (Pa.) 265.

⁵ Van Winkle v. Satterfield, 58 Ark. 617, 25 S. W. Rep. 1113.

§ 793. **Liability of master for torts of servant — General rule.**—The master, as a general rule, is liable to third parties for all injuries caused by the act of his servant while acting within the scope of his duties as such. The injury under circumstances of this kind is chargeable to the master upon the theory that the act of the servant is the act of the master, and if any are injured by reason of the improper performance of duty by the servant, the master is liable, just as he would be if he should thus perform the act himself.¹ The fact that the master did not authorize the act, or that he may even have forbidden it, will not change the rule of liability if it was done in the line or scope of employment for which the servant is engaged.² The liability of the master arises from the relation of master and servant and by operation of law. It does not in any sense depend alone upon the contractual relations between the parties.³ Of course the liability extends to an injury arising from an unlawful assault by the servant made in connection with and in the discharge of his duties as servant.⁴ It is not at all necessary that the master expressly authorize the tortious act of his servant in order that there be a legal liability. As was aptly expressed by the court of appeals of New

¹ *Sly v. Edgley*, 5 Esp. 6; *Harriss v. Mabry*, 1 Ired. (N. C.) 240; *Andrews v. Boedecker*, 126 Ill. 605, 18 N. E. Rep. 651; *Shockley v. Shepherd*, 9 Houst. (Del.) 270, 32 Atl. Rep. 173; 2 Kent, Comm. 259; *Potulni v. Saunders*, 37 Minn. 517, 35 N. W. Rep. 379; *Louisville, N. A. & C. R. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. Rep. 572; 1 Bl. Comm. 429, 430, 431; *Rounds v. Delaware, L. & W. R. R. Co.*, 64 N. Y. 129; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Smith v. Causey*, 28 Ala. 655; *Middleton v. Fowler*, 1 Salk. 282; *Philadelphia & R. R. R. Co. v. Derby*, 14 How. (U. S.) 468; *Ellis v. Turner*, 8 T. R. 531; *Grammar v. Nixon*, 1 Str. 653; *Maier v. Randolph*, 33 Kan. 340, 6 Pac. Rep. 625; *Schulte v. Holliday*, 54 Mich. 73, 19 N. W. Rep. 752; *Walker v. Johnson*, 28 Minn. 147, 9 N. W. Rep. 632; *Schrubbe v. Connell*, 69 Wis. 476, 34 N. W. Rep. 503; *Birmingham*

Water-Works Co. v. Hubbard, 85 Ala. 179, 4 S. Rep. 607; *Ellegard v. Acklund*, 43 Minn. 352, 45 N. W. Rep. 715.

² *Denver, S. P. & P. R. R. Co. v. Conway*, 8 Colo. 1, 5 Pac. Rep. 142; *Philadelphia & W. R. R. Co. v. Brannen (Pa.)*, 2 Atl. Rep. 429; *Harris v. Louisville, N. O. & T. R. R. Co.*, 35 Fed. Rep. 116; *Heenrich v. Pullman Palace Car Co.*, 20 Fed. Rep. 100; *Atchison, T. & S. F. R. R. Co. v. Randall*, 40 Kan. 421, 19 Pac. Rep. 783; *Garretsen v. Duenckel*, 50 Mo. 104; *New Orleans, M. & C. R. R. Co. v. Hanning*, 82 U. S. 649; *Lake Shore & M. S. Ry. Co.*, 147 U. S. 101, 13 Sup. Ct. Rep. 261; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 137, 7 Sup. Ct. Rep. 1039; *Mound City Paint & Color Co. v. Conlon*, 92 Mo. 221, 4 S. W. Rep. 922.

³ *Ward v. Young*, 42 Ark. 542.

⁴ *McCann v. Tillinghast*, 140 Mass. 327, 5 N. E. Rep. 164.

York: "To make a master liable for the wrongful act of the servant to the injury of a third person, it is not necessary to show that he expressly authorized the particular act. It is sufficient to show that the servant was engaged at the time in doing his master's business, and was acting within the general scope of his authority, and this although he departed from private instructions of the master, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury. . . . The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper or the undue influence of passion aroused by the circumstances of the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another.¹ Of course there is no difference in the legal rule where the master is a corporation, as, for instance, a railroad or other corporation.² Indeed, the law goes even further and holds a master liable for the acts of his servant within the scope of his employment, though the master expressly and positively forbids his servant to do the wrongful act.³

"It is, in general, no excuse to the employer that an injury which has occurred was caused by disobedience of his orders. He assumes the risk of such disobedience when he puts the servant into his business, and the reasons for holding him re-

¹ *Cohen v. Dry Dock, E. B. & B. R. R. Co.*, 69 N. Y. 170, 173; *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468; *Turberville v. Stampe*, 1 Ld. Raym. 264.

² *Orleans v. Platt*, 99 U. S. 676; *Weightman v. Washington*, 66 U. S. 39; *Moore v. Fitchburg R. R. Co.*, 4 Gray (Mass.), 465; *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468; *Holmes v. Wakefield*, 12 Allen (Mass.), 580; *Hewitt v. Swift*, 13 Allen (Mass.), 420; *Ramsden v. Boston & A. R. R. Co.*, 104 Mass. 117; *Marion v. Chicago, R. I. & P. Ry. Co.*, 64 Iowa, 568, 21 N. W. Rep. 86; *First Baptist Church v. Schenectady & T. R. R. Co.*, 5 Barb. 79; *Coon v. Utica R. R. Co.*,

6 Barb. 231; *Merchants' Nat. Bank v. State Nat. Bank*, 77 U. S. 604; *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. Rep. 261; *Philadelphia, W. & B. R. R. Co. v. Quigley*, 21 How. (U. S.) 202; *First Nat. Bank v. Graham*, 100 U. S. 699; *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. Rep. 1055; *Denver & R. G. Ry. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. Rep. 1286.

³ *Cosgrove v. Ogden*, 49 N. Y. 255; *Garretsen v. Duenckel*, 50 Mo. 104; *Dickson v. Waldron*, 135 Ind. 537, 34 N. E. Rep. 506; *French v. Creswell*, 13 Oreg. 418, 11 Pac. Rep. 62; *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468.

sponsible for the servant's conduct are the same whether the injury results from a failure to observe the master's directions or from a neglect of the ordinary free actions for which no specific directions are deemed necessary."¹ But in order to fasten a liability upon the master, the act, though improper, or even forbidden by the master, must be within the legitimate scope of the employment and duties of the servant. The master is not liable for the torts of a servant resulting from an act not within his duties, and not in any way authorized, though at the time the act is committed the servant is in the actual employment of the master, and subject to his directions.² This doctrine, however, seems to have been carried to an extreme by the court of appeals of New York in the case of *Isaacs v. Third Ave. R. R. Co.*³ In this case the plaintiff was a passenger on a horse-car of the defendant. Desiring to get off at a certain street, she notified the conductor of the car accordingly, and the car slowed up, but did not stop. The passenger, properly declining to get off the car while moving, requested the conductor to bring the car to a stop. This he declined to do, and at the same time pushed the passenger off the car in a violent manner, and she fell on the pavement, breaking her leg and sustaining other injuries. The court of appeals of New York held that the act of the conductor was beyond the scope of his duty, and that the company was not liable.⁴ In the first American edition of Moak's Underhill on Torts, commenting on this case, it is said: "This case was clearly erroneously decided. A carrier owes to a passenger the duty of safely taking him up, safely carrying him, and safely and properly setting him down again. The railway company, from its contract with and relation to the passenger, owed her the duty of providing her with a safe, proper and courteous exit from its car. Defendant's employees, particularly the conductor in charge of the car, were charged with the duty of providing it. When the conductor violated that duty, he, as the railway's employee, was clearly guilty of a breach of that duty for which

¹ Cooley, J., in *Railway Co. v. Bayfield*, 37 Mich. 205.

781; *Johanson v. Pioneer Fuel Co.* (Minn.), 75 N. W. Rep. 719.

² *Chicago City Ry. Co. v. Mogk*, 44 Ill. App. 17; *Moore v. Columbia & G. R. R. Co.*, 38 S. C. 1, 16 S. E. Rep.

³ 47 N. Y. 122.

⁴ See, too, *Wright v. Wilcox*, 10 Wend. 343.

it was responsible."¹ That such a precedent should ever have been established by the highest court in New York, a state from which so many others have taken their laws, and to which they have looked with assurance from the earliest history of this country for correct judicial precedent, is to be regretted. In fact later cases in this state practically deny this doctrine, though some caution seems to have been taken not to do so directly.²

§ 794. Tort — Liability of servant.— While the master is liable for acts committed by the servant within the legitimate scope of the employment, or by the command or direction of the master, yet that will not relieve the servant from liability also. For, though he is bound in law to obey the instructions and direction of the master as to his domestic duties, yet he is not required, and in fact is forbidden, to obey a command which would result in a violation of the law or an injury to another.³

§ 795. Unauthorized acts of servant — Liability of master. The rule of liability of the master for the acts of his servant does not extend to unauthorized acts not connected with, incident to, or within the real or apparent scope of the employment. If the servant, therefore, departs from the instructions given him by his master as a guide to the performance of his duties, and does an act not necessary to or arising properly from his service and the reasonable scope thereof, whereby an injury is inflicted upon the person or property of another, the servant alone is liable, for the master cannot be held in law to con-

¹ Moak's Underhill on Torts (1st Am. ed.), p. 31. Continuing, the learned author says: "It would have been better had the court of appeals, on the first opportunity, promptly overruled the case. Instead of doing so, with that respect for a former adjudication so commendable in a proper, or perhaps even in a doubtful, case, it has by metaphysical distinctions of fact, rather than principle, distinguished case after case until little remains of it except a skeleton furnishing an

apology for an appeal to that court in every case to see whether court or counsel can discern a distinction enabling the court to decide the case on principle rather than authority."

² Rounds v. Delaware, L. & W. R. Co., 64 N. Y. 129; Mott v. Consumers' Ice Co., 73 N. Y. 543. And see Duggins v. Watson, 15 Ark. 118; Philadelphia & R. R. Co. v. Derby, 14 How. (U. S.) 468; Seymour v. Greenwood, 6 H. & N. 359.

³ 1 Bl. Comm. 129, 130; Hewett v. Swift, 3 Allen (Mass.), 420.

template any extraordinary act of his servant not authorized directly or indirectly, and which is outside of, and neither necessary nor proper in the due and regular performance of, the service.¹ In cases of this kind the criterion for determining whether the master is liable or not is to ascertain if the act was done within the real or apparent scope of the service or authority of the master. This ascertained, the solution of the question becomes easy enough.² And, in any event, the burden of proof is on the party claiming a right of recovery by reason of the tort of the servant, acting for the master, to prove that the injury occurred while the servant was acting within the scope of his real or apparent authority.³

§ 796. Liability of master for wilful acts of servant.—The rule of liability of the master for the wilful or unnecessary acts of his servant, whereby an injury is done to another, must depend upon the fact whether the act of the servant is in the performance of his service or in furtherance of the interests of the master within the scope of his authority. If so done such acts are chargeable to the master, though the servant may have acted improperly, or even wilfully or needlessly, and in actual disregard of his private instructions.⁴ Upon this princi-

¹ Moak's Underhill on Torts (1st Am. ed.), p. 33; Isaacs v. Third Ave. R. R. Co., 47 N. Y. 122; Mott v. Consumers' Ice Co., 73 N. Y. 543; Sleath v. Wilson, 9 Car. & P. 607; Richmond Turnpike Co. v. Vanderbilt, 1 Hill (N. Y.), 480; Wright v. Wilcox, 19 Wend. 343; M'Manus v. Crickett, 1 East, 106; Curtis v. Dinneen (Dak.), 30 N. W. Rep. 148; Crofts v. Allison, 4 Barn. & Ald. 590; Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 3 S. Rep. 631; Central Ry. Co. v. Peacock, 69 Md. 257, 14 Atl. Rep. 709; Cleveland v. Newsom, 45 Mich. 62, 7 N. W. Rep. 284; Golden v. Newbrand, 52 Iowa, 59, 2 N. W. Rep. 425; Marrier v. St. Paul, M. & M. Ry. Co., 31 Minn. 851, 17 N. W. Rep. 952; 2 Kent, Comm. 260.

² Mott v. Consumers' Ice Co., 73 N. Y. 543.

³ Hershberger v. Lynch (Pa.), 11 Atl. Rep. 642.

⁴ Shea v. Sixth Ave. R. R. Co., 62 N. Y. 180; Mott v. Consumers' Ice Co., 73 N. Y. 543; Seymour v. Greenwood, 6 H. & N. 359; Limpus v. London General Omnibus Co., 1 H. & C. 526; Jefferson R. R. Co. v. Rogers, 38 Ind. 116; Philadelphia & R. R. Co. v. Derby, 14 How. (U. S.) 468; Howe v. Newmarch, 12 Allen (Mass.), 40; Young v. South Boston Ice Co., 150 Mass. 527, 23 N. E. Rep. 326; Holmes v. Wakefield, 12 Allen (Mass.), 580; St. Louis S. W. Ry. Co. v. Berger, 64 Ark. 613, 44 S. W. Rep. 800; Brill v. Eddy, 115 Mo. 596, 22 S. W. Rep. 488; Ward v. Young, 42 Ark. 542; Priester v. Augley, 5 Rich. (S. C. Law), 44; Weed v. Panama R. R. Co., 17 N. Y. 362; King v. Illinois Cent. R. R. Co., 69 Miss. 245, 10 S. Rep. 42; Barabasz v.

ple it was held where a passenger, in being assisted to alight from an omnibus by the driver, is injured by improper or unnecessary violence on the part of the latter, that the master will be liable for such injury so inflicted by his servant, though he did not expressly authorize the wrongful act.¹ So, when the master directed his servant to go to a certain place, but the servant, disregarding his master's orders, drove to another, and in so doing came in contact with a pedestrian, it was held that the master was liable for the tort, as he had intrusted the servant with the carriage and thereby placed it in his power to injure the stranger.² And where a railroad company had employed a servant to guard its freight house and cars, and the servant, while so guarding the property, wrongfully shot a stranger, supposing he intended to molest the property, it was held that the master was liable for the injury.³ It has been held in Arkansas that a street-car company is not liable for the wrongful arrest of a person by a conductor of an electric car for failing or refusing to pay fare.⁴ But this ruling does not seem to be in harmony with the previous decisions of the court or with well-considered precedents elsewhere. "There can be no question that where a railroad company, or any other body, have upon the spot a person acting as their agent, that is evidence to go to the jury that that person has authority to do all those things on their behalf which are right and proper in the exercise of their business,—all such things as somebody must make up his mind, on behalf of the company, whether they should be done or not; and the fact that the company is absent and the person is there to manage their affairs is *prima facie* evidence that he was clothed with authority to do all things right and proper, and if he happens to make a mistake or commit an excess while acting within the

Kabat (Md.), 37 Atl. Rep. 720; Nashville & C. R. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52; McKinley v. Chicago & N. W. R. R., 44 Iowa. 314; St. Louis, I. M. & S. Ry. Co. v. Hackett, 58 Ark. 381, 24 S. W. Rep. 881; Johnson v. Chicago, R. I. & P. Ry. Co., 58 Iowa, 348, 12 N. W. Rep. 329; Murphy v. Western & A. R. R. Co., 23 Fed. Rep. 637.

¹ Seymour v. Greenwood, 6 H. & N. 359.

² Sleath v. Wilson, 9 Car. & P. 607.

³ St. Louis, I. M. & S. Ry. Co. v. Hackett, 58 Ark. 381, 24 S. W. Rep. 881. And see, to like effect, Brill v. Eddy, 115 Mo. 596, 22 S. W. Rep. 488.

⁴ Little Rock Traction & E. Co. v. Walker, 65 Ark. 144, 45 S. W. Rep. 57, Wood, J., dissenting.

scope of his authority, his employers are responsible for it.”¹ Upon this very principle the Arkansas court correctly held the master liable for the wrongful shooting of a stranger by a guardsman while in the discharge of his duty.² The Rhode Island court held the employer liable for the wrongful arrest by his clerk of a person upon a charge of stealing goods from his master’s store.³ In Illinois it is held, where a conductor improperly ejects a passenger from his car, the master is liable for the injury, though the servant in doing the act unnecessarily acted wilfully or wantonly.⁴

So where the conductor of a railroad train attempted to seize the baggage of a passenger in order to secure or compel the payment of fare, he was held to be acting within the scope of his authority, and that his master was liable for the wrong resulting therefrom.⁵ In the leading case of *Lynch v. Railroad Co.*,⁶ a gatekeeper of the company had been instructed by his master not to let any one pass without showing a ticket. He improperly had one apprehended who had not a ticket, and the company was held liable in damages for the wrongful arrest. In sustaining this liability the learned court, *inter alia*, said: “In anything that he (the gatekeeper) did he did not act for any purpose of his own, but to discharge what he believed to be his duty to his principal. It matters not that he exceeds the powers conferred upon him by his principal, and that he did an act which the principal was not authorized to do, so long as he acted in the line of his duty; or, being engaged in the service of the defendant, attempted to perform a duty pertaining, or which he believed to pertain, to that service.” A conductor or other servant imposes a liability upon his master when he puts a person off a train or street car in obedience to instructions not to let any one ride without paying fare; etc. In such cases the master is even liable for a wilful assault upon the passenger by the servant, made in discharging his duty.⁷

¹ Blackburn, J., in *Poulton v. Railway Co.*, L. R. 2 Q. B. 534, cited with approval in the recent well-considered case of *Staples v. Schmid*, 18 R. L. 224, 26 Atl. Rep. 193.

² *St. Louis, I. M. & S. Ry. Co. v. Hackett*, 58 Ark. 381, 24 S. W. Rep. 881.

³ *Staples v. Schmid*, 18 R. L. 224, 26 Atl. Rep. 193.

⁴ *North Chicago City Ry. Co. v. Gastka*, 128 Ill. 613, 21 N. E. Rep. 522.

⁵ *Ramsden v. Boston & A. R. R. Co.*, 104 Mass. 117.

⁶ 90 N. Y. 77.

⁷ *Holmes v. Wakefield*, 12 Allen

Upon the same principle a railroad company is held liable to the owner of horses which have been frightened and caused to run away to his injury by reason of the unnecessary, wilful and malicious blowing of the steam whistle by the engineer while driving the engine.¹ This is no doubt within the scope of the service of the engineer, though he performed his service in an unlawful manner. It is a violation of his duty to his master, it is true, and the servant is no doubt liable to the master for the injury he has thus charged him with; but this fact does not relieve the master from liability for a wrongful act he has done to the injury of another through the medium of his servant. Where section-hands remove a dead animal which has been struck by a train to a place where it becomes a nuisance, instead of burying it, as their duty and instructions from their master would require, the master is liable for the injury thus brought about.² And the proprietor of a theater is liable to a person wrongfully assaulted by his doorkeeper, though the latter had the right and authority to expel any one refusing or failing to pay proper toll for admittance.³ A servant of a steamboat company binds his master in making an unlawful assault upon a passenger in the discharge of his duties.⁴ The supreme court of the United States in a recent case held that a railroad company was liable in actual damages to the injured person as well as for the humiliation and mortification incident to his unlawful arrest by a servant of the company.⁵

(Mass.), 580; *Winnegar's Adm'r v. Frazier*, 93 Ala. 450, 9 S. Rep. 303; *Central Passenger Ry. Co.*, 85 Ky. 547, 4 S. W. Rep. 237. And the following additional cases will be found analogous and instructive: *Kansas City, Ft. S. & G. Ry. Co. v. Kelly*, 36 Kan. 655, 14 Pac. Rep. 172; *Kline v. Central Pac. R. R. Co.*, 37 Cal. 400; *Northwestern R. R. Co. v. Hack*, 66 Ill. 238; *Fick v. Chicago & N. W. Ry. Co.*, 68 Wis. 469, 32 N. W. Rep. 527; *Allen v. Railway Co.*, L. R. 6 Q. B. 65; *Smith v. Webster*, 23 Mich. 298; *Bearden v. Felch*, 109 Mass. 154; *Poulton v. Railway Co.*, L. R. 2 Q. B. 534; *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. Rep. 261; *Alabama G. S. R. R. Co. v. McDonald v. Franchere* (Iowa), 71 N. W. Rep. 427.

¹ *Cobb v. Columbia & G. R. R. Co.*, 37 S. C. 194, 15 S. E. Rep. 878.

² *Baxter v. Chicago, R. I. & Pac. Ry. Co.*, 87 Iowa, 488, 54 N. W. Rep. 350.

³ *Dickson v. Waldron*, 135 Ind. 537, 34 N. E. Rep. 506.

⁴ *New Jersey Steamboat Co. v. Prentice*, 121 U. S. 637, 7 Sup. Ct. Rep. 1039.

⁵ *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. Rep. 261. And see *Cone v. Central R. R. Co. of N. J.* (N. J.) 40 Atl. Rep. 780.

But in all such cases exemplary damages will not be awarded against the master unless he was in some way privy to the act or participated in it.¹ It is generally left to the jury in instances of this kind to decide as a question of fact whether the master is to be bound by the act of the servant.² The act may be done in such a wanton, wilful or reckless manner as to make the master liable even for exemplary damages, as the act of the servant is the act of the master, and the liability of the latter will be precisely the same, where the servant is acting within the scope of his employment, as though the act were done in person by the master instead of through the agency of his servant and representative.³

§ 797. Master not liable for malicious acts of servant when unauthorized by the contract of service.—A master is not liable to a stranger, as a general rule, for a wanton or malicious act of his servant unless this be authorized by the master. The contract of employment being for a lawful business, the servant would not be authorized to depart from his employment or service and inflict a wilful or malicious injury upon another, though this be done while the servant is in the actual employment of the master, provided it is not done in the discharge of his duties as servant.⁴ This principle should be understood, however, as screening the master from liability for the acts of his servant only so long as the servant is not pursuing his calling or prosecuting his master's business. If the servant should do an act not connected with such business without the knowledge or consent of the master, the latter

¹ Hagan v. Railroad Co., 3 R. I. 88; S. R. R. Co. v. Frazier, 93 Ala. 45, 9 Cleghorn v. Railway Co., 56 N. Y. 44; S. Rep. 302.

Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. Rep. 261.

² Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. Rep. 261; Lynch v. Railroad Co., 90 N. Y. 77; Staples v. Schmid, 18 R. I. 224, 26 Atl. Rep. 193.

³ Lucas v. Michigan Central R. R. Co., 98 Mich. 1, 56 N. W. Rep. 1039; Mobile & O. R. R. Co. v. Seals, 100 Ala. 366, 13 S. Rep. 917; Alabama G.

⁴ Wright v. Wilcox, 19 Wend. 343; Richmond, etc. Turnpike Co. v. Vanderbilt, 2 N. Y. 479; Wood v. Detroit City Ry. Co., 52 Mich. 402, 18 N. W. Rep. 124; Alabama G. S. R. R. Co. v. Harris, 71 Miss. 74, 14 S. Rep. 263; International & G. R. R. Co. v. Anderson, 82 Tex. 516, 17 S. Rep. 1039; Texas & Pac. R. R. Co. v. Black, 87 Tex. 160, 27 S. W. Rep. 118. And see Louisville, N. O. & T. Ry. Co. v. Douglass, 69 Miss. 723, 11 S. Rep. 933.

would not be liable, though the act of the servant bringing about the injury be committed while in the employment of the master. The test is, was the servant about his master's business when the injury occurred? If so, the master will be liable for damages by reason of the act of the servant.

§ 798. Partnership — Injury to servant — Liability of partners.— Where a servant is engaged by a firm to serve the members thereof in their firm business, he may, ordinarily, obey the directions of any member of the firm, whether he was employed by that particular member or not; and if in obeying the instructions or directions of any member of the partnership he is injured without fault on his part, all the members will be liable to him by reason thereof, though some of them may not have known of the instructions.¹

§ 799. Negligence of servant — Liability of master when servant temporarily under directions of third person.— The master is responsible for the negligence of his servant while in his employ and in the line of his duty, though for the time being, and when the negligence actually takes place, the servant is temporarily under the control of another with the consent of the master. "Upon the principle that *qui facit per alium facit per se* the master is responsible for the acts of his servants; and that person is undoubtedly liable who stood in the relation of master to the wrong-doer; he who had selected him as his servant from the knowledge of and belief in his skill and care, and who could remove him for his misconduct, and whose orders he was bound to receive and obey."² The fact that the person temporarily having charge of the servant requests the master to furnish the servant makes no difference. The servant is still

¹ Ashworth v. Stanwix, 3 El. & El. (Q. B.) 701; Haley v. Case, 142 Mass. 316, 7 N. E. Rep. 877.

² Quarman v. Burnett, 6 M. & W. 499; Huff v. Ford, 126 Mass. 24; Feuton v. Dublin St. Packet Co., 8 Ad. & E. 835; Smith v. Railway Co., 19 N. Y. 129; Crockett v. Calvett, 8 Ind. 127; Weyant v. Railway Co., 3 Duer, 360; Norris v. Kohler, 41 N. Y. 42; Joslin v. Grand Rapids Ice Co., 50

Mich. 516, 15 N. W. Rep. 887; Atlas Engine Works v. Randall, 100 Ind. 293; Croft v. Alison, 4 Barn. & Ald. 590. See, too, Dean v. Hogg, 10 Bing. 345; Higgins v. W. U. Tel. Co. (N. Y.), 50 N. E. Rep. 500; Kimball v. Cushman, 103 Mass. 194; Gaines v. Bard, 57 Ark. 615, 22 S. W. Rep. 570; Langer v. Pointer, 5 Barn. & Cr. 579; Heygood v. State, 59 Ala. 51.

the servant of the master, subject to his orders and under his control. Practical application of this rule is frequently found in cases where one hires a carriage or other vehicle from another who also furnishes one of his servants as a driver for the occasion. The master is liable for the negligence of the servant thus furnished whereby an injury is inflicted upon the person hiring the vehicle.¹

§ 800. Master not liable for injury to servant occurring beyond the scope of employment.— While the master is liable to the servant for any injury resulting from his omission of duty when the servant is not at fault, this liability is confined to injuries arising out of the employment, and exists only while the servant is acting within the legitimate scope of his service. If an injury occur to a servant when he is acting outside his employment and in disregard of the directions or instructions of the master, the latter will not be liable.²

§ 801. Liability of master for injury to servant — Fellow-servants — Grade of employment.— Ordinarily, a servant who is employed by the master in the same business with another servant is a fellow-servant of such other where they are under the same control. It makes no difference that the employment of one differs from that of another, or that the service of some servants is of a different grade to that of others. They are yet to all purposes in law fellow-servants so long as the conditions of common employment and supervision exist.³ So the fore-

¹ Quarman v. Burnett, 6 M. & W. 499; Joslin v. Grand Rapids Ice Co., 50 Mich. 516, 15 N. W. Rep. 887.

² Johnson v. Armour, 18 Fed. Rep. 490.

³ McAndrews v. Burns, 39 N. J. Law, 117; Blake v. Maine Cent. R. R. Co., 70 Me. 60; Peterson v. Whitebreast C. & M. Co., 5 Iowa, 673; Collier v. Steinhart, 51 Cal. 116; Ziegler v. Bay, 123 Mass. 152; Baltimore Elevator Co. v. Neal, 65 Md. 438, 5 Atl. Rep. 338; Gardner v. Michigan Cent. R. R. Co., 58 Mich. 584, 26 N. W. Rep. 301; Lawler v. Androscoggin R. R. Co., 62 Me. 463; Feltham v. England, L. R. 2 Q. B. 33; Albro v. Agawam

Canal Co., 6 Cush. (Mass.) 75; McLean v. Blue Point Gravel Min. Co., 51 Cal. 255; Lewis v. Seifert, 116 Pa. St. 628, 11 Atl. Rep. 514; Rohback v. Pacific R. R. Co., 43 Mo. 187; Hodgkins v. Eastern R. R. Co., 119 Mass. 419; Conley v. Portland, 78 Me. 217, 3 Atl. Rep. 658; St. Louis. I. M. & S. Ry. Co. v. Shackelford, 42 Ark. 417; Cowan v. Umbagog Pulp Co. (Me.), 39 Atl. Rep. 340; Brown v. W. & St. P. R. R. Co., 27 Minn. 162, 6 N. W. Rep. 484; Foraker v. St. Paul, M. & M. Ry. Co., 32 Minn. 54, 19 N. W. Rep. 349; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; Clifford v. Old Colony R. R. Co., 141 Mass. 564, 6 N. E. Rep. 751; Robert-

man of a gang of workmen, as, for instance, a crew of section-hands on a railroad, or a foreman or overseer of a number of persons in charge of those in the service of the same master, and who works in no other department of his master's service other than that in which those he is placed over work, the character and nature of the work of both foreman and his crew being the same, such foreman or overseer is usually held to be a fellow-servant of those under him, and the common master is not liable for an injury to a servant under such foreman, where the injury was brought about by the negligence or wrongful act of the foreman.¹

§ 802. Fellow-servant — Definition.— A fellow-servant is one who serves a common master with another or others in the same line of business. The relation of fellow-servant arises where the employees are brought into personal association by their ordinary duties or co-operate with each other in some particular work for a common master, and whose joint services are necessary to a due and effective performance of the work of the master.² "The term 'fellow-servant,' in short, includes all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it."³

§ 803. Incompetency of fellow-servants — Knowledge of servant — Waiver.— If a servant have knowledge of the fact that the master has selected an incompetent fellow-servant, it

son v. Terre Haute & I. R. R. Co., 78 Ind. 77; Indiana Car Co. v. Parker, 100 Ind. 181; Pittsburg, C. & St. Louis Ry. Co. v. Adams, 105 Ind. 151, 5 N. E. Rep. 187; Willis v. Oregon Ry. & Nav. Co., 11 Oreg. 257, 4 Pac. Rep. 121; Loughlin v. State, 105 N. Y. 159, 11 N. E. Rep. 371; Brazil & Chicago Coal Co. v. Cain, 98 Ind. 282; Smith v. Oxford Iron Co., 42 N. J. Law (13 Vr.), 467.

¹ Brown v. W. & St. P. R. R. Co., 27 Minn. 162, 6 N. W. Rep. 484; Fraker v. St. Paul, M. & M. Ry. Co., 32 Minn. 54, 19 N. W. Rep. 349; Weger v. Railroad Co., 55 Pa. St. 460; Peechel v.

Chicago, M. & St. P. Ry. Co., 62 Wis. 338, 21 N. W. Rep. 269; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; Gaynon v. Durkee, 87 Fed. Rep. 302.

² Chicago & N. R. R. Co. v. Moranda, 93 Ill. 324; Brown v. Central Pac. R. Co., 68 Cal. 171, 7 Pac. Rep. 447; Wilson v. Charleston & S. Ry. Co. (S. C.), 28 S. E. Rep. 91.

³ McLean v. Blue Point Gravel Co., 51 Cal. 255; Wood, Master & Servant, § 435; Brown v. Central Pac. R. R. Co., 68 Cal. 171, 7 Pac. Rep. 447; Foster v. Missouri Pac. Ry. Co., 115 Mo. 165, 21 S. W. Rep. 916.

is his duty to make complaint of the fact to the master, to the end that the evil may be remedied. But if he elects to continue in the service, well knowing that the fellow-servant is incompetent and not a fit person to perform safely or properly the duties assigned to him by the common master, the servant will thereby waive his right to hold the master liable for an injury resulting to him by reason of the incompetency of such servant.¹ This is a hazard to which no servant need expose himself; but if he prefers to run the risk of injury rather than make any effort to have the incompetent servant removed, he may do so: the law does not require him to complain.

§ 804. Liability of master for injury at the hands of a fellow-servant.—Having used due discretion and caution in selecting suitable servants for his work, the master is not liable for an injury to a servant occurring by reason of the negligence of another servant in the same line of employment. He has the right to assume that all servants will take necessary and proper precaution not to injure another in the same service; and, if the injury nevertheless takes place by reason of the negligence or carelessness of a fellow-servant, there can be no recovery from the master.² Further, the master, of course,

¹ *Davis v. Detroit & M. R. R. Co.*, 20 Mich. 105; *Frazier v. Pennsylvania R. R. Co.*, 38 Pa. St. 104; *Haskins v. Railway Co.*, 65 Barb. 129; *Kroy v. Chicago, R. I. & P. R. R. Co.*, 32 Iowa, 357; *Griffiths v. Gidlow*, 3 Hurl. & Nor. 648.

² *Lyon v. Railway Co.*, 31 Mich. 429; *Brewer v. Railway Co.*, 56 Mich. 620, 23 N. W. Rep. 440; *Goulin v. Bridge Co.*, 64 Mich. 190, 31 N. W. Rep. 44; *Northern Pac. R. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Benn v. Null*, 65 Iowa, 407, 21 N. W. Rep. 700; *Buckley v. Gould & Curry Silver Mining Co.*, 14 Fed. Rep. 833; *Quincy Mining Co. v. Kitts*, 42 Mich. 34, 3 N. W. Rep. 470; *Johnson v. Armour*, 18 Fed. Rep. 490; *St. Louis, I. M. & S. Ry. Co. v. Shackelford*, 42 Ark. 417; *Hurst v. Burnside*, 12 Oreg. 520, 8 Pac. Rep. 888; *McQueen v. Cen-*

tral Branch U. P. R. R. Co., 30 Kan. 689, 1 Pac. Rep. 139; *Rohback v. Pacific R. R. Co.*, 43 Mo. 187; *Willis v. Oregon Ry. & Nav. Co.*, 11 Oreg. 257, 4 Pac. Rep. 121; *Hogan v. Central Pac. R. R. Co.*, 49 Cal. 128; *Columbus & I. C. Ry. Co. v. Arnold*, 31 Ind. 174; *Farwell v. Boston & W. R. R. Corp.*, 4 Metc. (Mass.) 49; *St. Louis, I. M. & S. Ry. Co. v. Mogart*, 45 Ark. 318; *Baltimore Elevator Co. v. Neaf*, 65 Md. 438, 5 Atl. Rep. 338; *Malone v. Burlington, C. R. & N. Ry. Co.*, 61 Iowa, 326, 16 N. W. Rep. 203; *Luce v. Chicago, St. P. & M. & O. R. R. Co.*, 67 Iowa, 75, 24 N. W. Rep. 600; *Little Rock & Ft. Smith R. R. Co. v. Duffey*, 35 Ark. 602; *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134; *Ryan v. Cumberland Valley R. R. Co.*, 23 Pa. St. 384; *Coon v. Syracuse & U. R. R. Co.*, 6 Barb. 231; *O'Connor v. Roberts*, 120

cannot prevent the unwarranted negligence of his servants whereby a fellow-servant is injured, and all who undertake work in conjunction with others under a common master are presumed to know this, to assume the risks incident thereto, and contract accordingly.¹ "Each one who enters upon the service of another takes upon himself all the ordinary risks of the employment in which he engages, and the negligence of his fellow-workman, in the general course of his employment, is within the ordinary risks."² But if the negligence of the master co-operates with that of a fellow-servant, so that the injury is brought about by the concurring negligence of the master and fellow-servant, the master will be liable, as he cannot screen himself from liability to his servant for his own negligence merely because a fellow-servant, too, was negligent and contributed thereby in bringing about the injury. The servant assumes the dangers arising from the negligence of his fellow-servant, but the law does not require that he also assume that of the master, though the concurring negligence of a fellow-servant assist in causing the injury.³

Mass. 227; *Whaalan v. Mad River & C. E. R. R. Co.*, 8 Ohio St. 249; *Grand v. Michigan Cent. R. R. Co.*, 83 Mich. 564, 47 N. W. Rep. 837; *Chicago & N. W. Ry. Co. v. Snyder*, 117 Ill. 376, 7 N. E. Rep. 604; *Neubauer v. New York, L. E. & W. R. R. Co.*, 101 N. Y. 607, 4 N. E. Rep. 125; *The Harold*, 21 Fed. Rep. 428; *Gilmore v. Northern Pac. Ry. Co.*, 18 Fed. Rep. 866; *St. Louis, Ark. & T. Ry. Co. v. Triplett*, 54 Ark. 289, 15 S. W. Rep. 831; *St. Louis, L. M. & S. Ry. Co. v. Harper*, 44 Ark. 524; *King v. Boston & W. R. R. Corp.*, 9 Cush. (Mass.) 112; *Dobbin v. Richmond & D. R. R. Co.*, 81 N. C. 446; *Ohio & M. R. R. Co. v. Tyndall*, 13 Ind. 366; *Pittsburg, Ft. W. & C. Ry. Co. v. Deviney*, 17 Ohio St. 197; *Chicago, St. Louis & N. O. R. R. Co. v. Doyle*, 60 Miss. 977; *Mast v. Kern* (Oreg.), 54 Pac. Rep. 950.

¹ *Northern Pac. R. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Brothers v. Carter*, 52 Mo. 375; *Brown v. W. & St. P. R. R. Co.*, 27

Minn. 162, 6 N. W. Rep. 72; *Farwell v. Boston & W. R. R. Corp.*, 4 Metc. (Mass.) 49; *Priestly v. Fowler*, 3 M. & W. 1; *Murray v. South Carolina R. R. Co.*, 1 McMull. (S. C.) 385; *Davis v. Central Vt. R. R. Co.*, 55 Vt. 84; *Hough v. Texas & P. R. R. Co.*, 100 U. S. 213; *Quinn v. New Jersey Lighterage Co.*, 23 Fed. Rep. 363; *Latre-mouille v. Bennington & R. R. R. Co.*, 63 Vt. 336, 22 Atl. Rep. 656; *Union Pac. R. R. Co. v. Fort*, 84 U. S. 553; *Cayzer v. Taylor*, 10 Gray (Mass.), 274.

² *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Willis v. Oregon Ry. & Nav. Co.*, 11 Oreg. 257, 4 Pac. Rep. 121; *Illinois Cent. R. R. Co. v. Cox*, 21 Ill. 20; *Chicago & A. R. R. Co. v. May*, 108 Ill. 288.

³ *Franklin, Adm'r, v. Winona & St. P. R. R. Co.*, 37 Minn. 409, 34 N. W. Rep. 898; *Keegan v. Western R. R. Corp.*, 8 N. Y. 175; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; *McMahon v. Henning*, 3 Fed. Rep. 353; *Norfolk & W. R. R.*

§ 805. **Who are fellow-servants — Illustrations.**— A few illustrations showing certain servants to be fellow-servants will doubtless serve a good purpose in illustrating the rule stamping, as fellow-servants, persons in a common service. It is held that a switch-tender and a locomotive engineer who are employed by the same master, and engaged in the same general service, are fellow-servants.¹ A conductor of a passenger train and a station agent employed by the same company, on the same line of railroad, are fellow-servants.² So are a conductor and engineer on the same railroad.³ A foreman or boss who superintends the work of hands, but having no authority to employ or discharge servants, is a fellow-servant of those whom he thus directs.⁴ The master and mate of a steam vessel are fellow-servants.⁵ A baggage-master and switch-tender are fellow-servants;⁶ an engineer and station agent are.⁷ A brakeman and station agent in the employ of the same master are fellow-servants.⁸ And likewise, as a general rule, are a yard-master and car inspector.⁹ A car inspector and car repairer who are controlled by a common foreman are fellow-servants.¹⁰

Co. v. Phelps, 90 Va. 665, 19 S. E. Rep. 652; Booth v. Railroad Co., 73 N. Y. 38; Cove v. Railroad Co., 81 N. Y. 206; Richmond & D. R. R. Co. v. Brown, 89 Va. 753, 17 S. E. Rep. 132; Clyde v. Richmond & D. R. R. Co., 59 Fed. Rep. 394; Louisville, N. A. & C. Ry. Co. v. Berkey, 136 Ind. 181, 35 N. E. Rep. 3; Delude v. St. Paul City Ry. Co., 55 Minn. 63, 56 N. W. Rep. 461; Faren v. Sellers, 39 La. Ann. 1011, 3 S. Rep. 363; Steller v. Chicago & N. W. Ry. Co., 46 Wis. 398, 1 N. W. Rep. 96.

¹ Brown v. Central Pac. Ry. Co., 68 Cal. 171, 7 Pac. Rep. 447; Farwell v. Boston & W. R. R. Corp., 4 Metc. (Mass.) 49.

² Dealey v. Philadelphia & R. R. R. Co. (Pa.), 4 Atl. Rep. 170.

³ St. Louis, I. M. & S. Ry. Co. v. Shackelford, 42 Ark. 417.

⁴ Waddell v. Simpson, 112 Pa. St. 567, 4 Atl. Rep. 725; Delaware & Hudson Canal Co. v. Carroll, 89 Pa. St.

374; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; Williams v. Thacker Coal & Coke Co. (W. Va.), 30 S. E. Rep. 107; Anderson v. Winston, 31 Fed. Rep. 528; Stephens v. Doe, 73 Cal. 26, 14 Pac. Rep. 378; Peschel v. Chicago, M. & St. P. Ry. Co., 62 Wis. 338, 21 N. W. Rep. 269; Zeigler v. Day, 123 Mass. 152; Olson v. St. Paul, M. & M. Ry. Co., 38 Minn. 117, 35 N. W. Rep. 866.

⁵ Mathews v. Case, 61 Wis. 491, 21 N. W. Rep. 513.

⁶ Roberts v. St. Paul, M. & O. Ry. Co., 33 Minn. 218, 22 N. W. Rep. 389.

⁷ Brown v. Minneapolis & St. L. Ry. Co., 31 Minn. 553, 18 N. W. Rep. 834.

⁸ Toner v. Chicago, M. & St. P. R. R. Co., 69 Wis. 188, 31 N. W. Rep. 104; Gaffney v. New York & N. E. R. R. Co., 15 R. I. 456, 7 Atl. Rep. 284.

⁹ St. Louis, I. M. & S. Ry. Co. v. Rice, 51 Ark. 467, 11 S. W. Rep. 699.

¹⁰ Fordyce v. Briney, 58 Ark. 198, 24 S. W. Rep. 250.

So are a brakeman and car inspector of the same company.¹ A bridge foreman and locomotive engineer have been held to be fellow-servants, though necessarily working in different departments of the business of the common master.² A brakeman and engineer are fellow-servants.³ So are a yardmaster and car-coupler.⁴ Likewise are a track-repairer and locomotive engineer working for the same master.⁵ The captain and mate of a steamboat are fellow-servants.⁶ So are a second mate of a vessel and the seamen employed thereon.⁷ And of course an engineer and fireman on the same train are.⁸ A conductor of a train and a section boss are fellow-servants.⁹ An elevator boy and a chambermaid employed by the same hotel are fellow-servants, so as to bar a recovery for an injury to the chambermaid while riding in the elevator attending to her duties.¹⁰ An engineer is a fellow-servant of a conductor on another train.¹¹ So is a brakeman of a crew on a different train in the service of the same master.¹² The conductor of a train is a fellow-servant of a section-hand;¹³ and of course an engineer and such a section-hand are.¹⁴

§ 806. Fellow-servants—Who are not.—Fellow-servants must be in the same employment, though not necessarily in the same grade of service, and owe allegiance to a common master. A servant of one railroad company, for instance, is not a fellow-servant of a servant of another, even though the trains of both companies use the same track by a joint arrangement.¹⁵ Some illustrations of the doctrine of fellow-servant

¹ *St. Louis, I. M. & S. Ry. Co. v. Gaines*, 46 Ark. 555.

² *St. Louis S. W. Ry. Co. v. Henson*, 61 Ark. 302, 32 S. W. Rep. 1079.

³ *Missouri Pac. Ry. Co. v. Texas & Pac. Ry. Co.*, 31 Fed. Rep. 527.

⁴ *Webb v. Richmond & D. R. R. Co.*, 97 N. C. 387, 2 S. E. Rep. 440; *Connerly v. Minneapolis E. Ry. Co.*, 38 Minn. 80, 35 N. W. Rep. 582.

⁵ *Van Winkle v. Manhattan Ry. Co.*, 32 Fed. Rep. 278.

⁶ *Caniff v. Blanchard Nav. Co.*, 66 Mich. 638, 33 N. W. Rep. 744.

⁷ *The Egyptian Monarch*, 36 Fed. Rep. 773.

⁸ *Gulf, C. & S. F. Ry. Co. v. Balohn*, 75 Tex. 637, 11 S. W. Rep. 867.

⁹ *Wright v. Northampton & H. R. Co. (N. C.)*, 29 S. E. Rep. 100.

¹⁰ *Oriental Investment Co. v. Slime* (Tex. Civ. App.), 41 S. W. Rep. 130.

¹¹ *Oakes v. Mase*, 166 U. S. 399, 17 Sup. Ct. Rep. 345.

¹² *Northern Pac. R. R. Co. v. Poirier*, 167 U. S. 48, 17 Sup. Ct. Rep. 741.

¹³ *Wright v. Southern Ry. Co.*, 80 Fed. Rep. 260.

¹⁴ *Hastings v. Montana Union Ry. Co.*, 18 Mont. 493, 46 Pac. Rep. 264.

¹⁵ *Chicago & E. J. R. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. Rep.

will no doubt serve a good purpose. A train-dispatcher who, by virtue of his employment and authority, controls and manages the movements of all trains within a given territory, is not a fellow-servant of any of the servants of the company engaged in running the trains, though they necessarily have a common master; for the duties of the dispatcher and the nature of his employment are supervisory. Those running the trains must do so as he directs, and cannot refuse.¹ Nor is a train-dispatcher a fellow-servant of any other servants of the common master who are subordinate to him and under his control.² A train-dispatcher, therefore, is not a fellow-servant of a track-laborer. The track-laborer is merely a servant, without any authority over others, while the train-dispatcher is a vice-principal to whom the master has delegated important duties and discretion.³ A brakeman is not a fellow-servant of a road-master.⁴ A conductor of a construction train of day laborers, who are under his authority and control, is not a fellow-servant of such laborers.⁵ A train-dispatcher and brakeman are not fellow-servants.⁶ An ordinary seaman is not a fellow-servant of the master of a vessel.⁷ A master mechanic of a railroad company is not a fellow-servant of a switchman of the same company.⁸ Nor is a fireman a fellow-servant of such master mechanic.⁹ The conductor of a train is not a fellow-servant of the engineer, fireman, or other servant engaged in the running of the train and subject to his orders.¹⁰ Hands employed by

263; *Ziegler v. Danbury & N. R. R. Co.* (Conn.), 2 Atl. Rep. 462.

¹ *Little Rock & M. R. R. Co. v. Barry*, 58 Ark. 197, 23 S. W. Rep. 1097; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. Rep. 514; *Chicago, B. & Q. R. R. Co. v. Young*, 26 Ill. App. 115; *Lasky v. Canadian Pac. Ry. Co.*, 22 Atl. Rep. 367; *Hunn v. Michigan Cent. R. R. Co.*, 78 Mich. 513, 44 N. W. Rep. 502; *Louisville, N. A. & C. Ry. Co. v. Heck* (Ind.), 50 N. E. Rep. 988; *Crew v. St. Louis, K. & N. W. Ry. Co.*, 20 Fed. Rep. 87.

² *Smith v. Wabash, St. L. & P. Ry. Co.*, 92 Mo. 359, 4 S. W. Rep. 129.

³ *McKune v. California S. R. R. Co.*, 46 Cal. 302, 5 Pac. Rep. 482.

⁴ *Atchison, T. & S. F. R. R. Co. v. Moore*, 81 Kan. 197, 1 Pac. Rep. 644.

⁵ *Chicago, St. P., M. & O. Ry. Co. v. Lundstrum*, 16 Neb. 254, 20 N. W. Rep. 198; *Burlington & M. R. R. Co. v. Crockett*, 19 Neb. 138, 26 N. W. Rep. 921.

⁶ *Phillips v. Chicago, M. & St. P. Ry. Co.*, 64 Wis. 475, 25 N. W. Rep. 544.

⁷ *Thompson v. Hermann*, 47 Wis. 603, 3 N. W. Rep. 579.

⁸ *St. Louis, I. M. & S. Ry. Co. v. Harper*, 44 Ark. 524.

⁹ *Kruger v. Louisville, N. A. & C. Ry. Co.*, 111 Ind. 51, 11 N. E. Rep. 975.

¹⁰ *Railway Co. v. Keary*, 3 Ohio St. 201; *Railway Co. v. Stephens*, 20 Ohio

ship-owners to unload a cargo are not fellow-servants of the executive officers of the vessel.¹ A car-inspector is not a fellow-servant of a brakeman employed by the same common master.² An ordinary station telegraph operator and a brakeman have been held not to be fellow-servants.³ And generally any one to whom the master delegates the general management and control of servants, the master retaining no control over them himself, will be deemed a vice-principal, acting for and instead of the master, and the master will be bound by his acts and negligence the same as if done by himself.⁴

§ 807. Who are not fellow-servants — General rule.—Generally, where a master employs a servant with supervisory authority and control over another class of servants, with power to employ and discharge such servants; who directs their work and the manner, time and place of performing it; who manages the department of the work of the master over which he is thus placed, he is not a fellow-servant of those over whom he possesses and exercises this superintending control, and such servants are not responsible for his negligence, and do not assume the hazards thereof as one of the risks or dangers of the employment.⁵

St. 415; *Boatwright v. Northeastern R. R. Co.*, 25 S. C. 128; *Newport News & M. V. R. R. Co. v. Dentzel's Adm'r*, 91 Ky. 42, 14 S. W. Rep. 958; *Chicago, M. & St. P. R. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Shadd v. Georgia, C. & N. R. R. Co.*, 116 N. C. 968, 21 S. E. Rep. 554.

¹ *The Carolina*, 30 Fed. Rep. 199.

² *Carpenter v. Mexican Nat. R. R. Co.*, 39 Fed. Rep. 315.

³ *Hall v. Galveston, H. & S. A. Ry. Co.*, 39 Fed. Rep. 18. But see *contra*, *Monaghan v. New York Cent. & H. R. R. Co.*, 45 Hun, 113.

⁴ *Ryan v. Bagaley*, 50 Mich. 179, 5 N. W. Rep. 72; *Corcoran v. Holbrook*, 59 N. Y. 517; *Brothers v. Carter*, 52 Me. 365, 373; *Dobbin v. Richmond & D. R. R. Co.*, 81 N. C. 446; *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. Rep. 106; *Slater v. Chapman*, 67 Mich. 523, 35 N. W. Rep. 106; *Roddon v. Union Pac. Ry. Co.*, 5 Utah, 344, 15

Pac. Rep. 262; *Palmer v. Utah & N. Ry. Co.*, 2 Idaho, 290, 13 Pac. Rep. 425; *Haynes v. Railroad Co.*, 3 Cold. (Tenn.) 222; *Railroad Co. v. Wheelless*, 10 Lea (Tenn.), 741; *East Tenn. & W. N. C. R. Co. v. Collins*, 1 Pickle (Tenn.), 227, 1 S. W. Rep. 883; *East Tenn., Va. & Ga. R. R. Co. v. De Armond*, 86 Tenn. 73, 5 S. W. Rep. 600; *The Titan*, 23 Fed. Rep. 413; *Wabash, St. L. & Pac. Ry. Co. v. Hawk*, 121 Ill. 259, 12 N. E. Rep. 253; *Chicago & A. R. R. Co. v. May*, 108 Ill. 293; *Mullan v. Philadelphia & S. M. S. S. Co.*, 78 Pa. St. 25; *Baldwin v. St. Louis, K. & N. W. Ry. Co.*, 75 Iowa, 297, 39 N. W. Rep. 507; *Woods v. Lindvall*, 4 U. S. App. 49, 1 C. C. A. 37, 48 Fed. Rep. 62; *St. Louis, I. M. & S. Ry. Co. v. Rickman*, 65 Ark. 138, 45 S. W. Rep. 56.

⁵ *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20; *McKunne v. California S. R. Co.*, 66 Cal. 302, 5 Pac.

But, generally speaking, in order to constitute a servant such a vice-principal or superintending servant, he must have practical or substantial control of the department of the master's work he is employed to manage and direct.¹ The fact that the master used prudent care in the selection of such manager or superintendent will not relieve him from liability to other servants for his acts.² He must make a proper selection of a servant of such a high grade and who is invested with such responsible authority at his peril.

§ 808. Effect of rule governing fellow-servants on infants. Infant servants who have arrived at the age of discretion are subject to the rule absolving the master from liability for an injury to a servant resulting from the negligence of a co-servant. This rule is made partly to protect the master from indiscriminate liability on the one hand, and to prompt all servants to observe caution and prudence in the discharge of their duties for their mutual benefit and protection. The reason of the rule therefore applies as well to infants who have arrived at years of discretion as to others.³ An infant seventeen years of age is presumed to have sufficient discretion to avoid obvious dangers, and will be barred of the right of recovery by the negligence of a fellow-servant, unless it affirmatively appear that he did not have sufficient discretion to appreciate the danger from this source.⁴

§ 809. Duty of master to maintain competent servants.— The duty which the law imposes upon the master to select com-

Rep. 582; *Hough v. Texas & P. R. R. Co.*, 100 U. S. 213; *Gilmore v. Northern Pac. Ry. Co.*, 18 Fed. Rep. 866; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; *Malone v. Hathaway*, 64 N. Y. 5; *Berea Stone Co. v. Craft*, 31 Ohio St. 287; *Smith v. Oxford Iron Co.*, 13 Vroom (N. J.), 467; *Lalor v. Chicago, etc. R. R. Co.*, 52 Ill. 401; *Railroad Co. v. Moore*, 29 Kan. 632; *Hannibal & St. J. R. R. Co. v. Fox*, 31 Kan. 586, 3 Pac. Rep. 320; *Railroad Co. v. Holt*, 29 Kan. 149.

¹ *Willis v. Oregon Ry. & Nav. Co.*, 11 Oreg. 257, 4 Pac. Rep. 121; *Laning v. New York Cent. R. R. Co.*, 49 N. Y.

521; *Peterson v. White Breast Coal Co.*, 50 Iowa, 673.

² *Brown v. Sennet*, 68 Cal. 225, 9 Pac. Rep. 74.

³ *Ohio & Miss. R. R. Co. v. Tindall*, 13 Ind. 366; *Ohio & M. R. R. Co. v. Hammersley*, 28 Ind. 371; *Sullivan v. Toledo, W. & W. Ry. Co.*, 58 Ind. 26; *Brazil & Chicago Coal Co. v. Cain*, 98 Ind. 282; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151, 5 N. E. Rep. 187; *Brown v. Maxwell*, 6 Hill (N. Y.). 592.

⁴ *Sanborn v. Atchison, T. & S. F. R. Co.*, 35 Kan. 292, 10 Pac. Rep. 860.

petent servants continues and requires that he keep or maintain none after they become incompetent, for any reason, where he knows of the incompetency, or by the exercise of reasonable care and attention might or should ascertain the fact. The servant is entitled to this continuing protection, and has the right to expect that the master will discharge any servant who is found lacking in ability to properly fulfill his duties so as to reduce the necessary hazard to other servants to a reasonable minimum. And, failing to ascertain these facts when he might, or, ascertaining them, failing to discharge the unworthy servant, he will be liable to a co-servant who may be injured by reason of the retention of such incompetent servant, in like manner and to the same effect that he would have been had he neglected or failed in the first place to choose a proper and competent servant.¹ As was well said by the supreme court of Michigan: "A master who retains an incompetent servant in his employment, after knowledge comes to him of the unfitness of the servant for the service in which he is engaged, or of whose unfitness he might have known by the exercise of due diligence or ordinary care, is liable for injury to another servant caused by the negligent acts of the incompetent servant."² Whether or not the master has used reasonable care to ascertain any incompetency or unfitness of his servant will usually be a question of fact for a jury where the facts and circumstances of the case would warrant two conclusions.³

§ 810. Competency of servant — Care required in selecting.— A master, in order to shield himself from liability for damages resulting in an injury at the hands of his servant to a fellow-servant, must use ordinary care in making a suitable and intelligent selection of a servant. A failure to observe this requirement of the law will make him liable to other servants injured by reason of the lack of fitness of the servant for

¹ Wall v. Delaware, L. & W. R. R. Co., 54 Hun, 454, 7 N. Y. S. 709; affirmed, 125 N. Y. 727, 26 N. E. Rep. 757; Coppins v. N. Y. Cent. & H. R. R. Co., 122 N. Y. 557, 25 N. E. Rep. 914; Laning v. Railroad Co., 49 N. Y. 521; Gilman v. Railroad Corp., 10 Allen (Mass.), 233.

² Hilts v. Chicago & G. T. Ry. Co., 55 Mich. 437, 21 N. W. Rep. 878; Whitaker v. Delaware & H. Canal Co., 126 N. Y. 549, 27 N. E. Rep. 1042.

³ Hilts v. Chicago & G. T. Ry. Co., 55 Mich. 437, 21 N. W. Rep. 878; Whitaker v. Delaware & H. Canal Co., 126 N. Y. 549, 27 N. E. Rep. 1042.

the duties for which the servant has been selected. He must therefore use due care in making the selection. He must learn by reasonable diligence and inquiry the qualification and competency of the servant. He can indulge in no presumptions as to these matters.¹ And when this due care has been properly exercised, the master has the right to presume that the servant is and will continue competent until he has notice to the contrary.² The requisite degree of care "is such care as, in view of the consequences that may result from negligence on the part of the employees, is fairly commensurate with the perils or dangers likely to be encountered."³ If this standard of inquiry is less than is customary with masters in engaging servants, the custom must yield to the law.⁴ But the master is not required to exercise extraordinary care. When he has used the care an ordinarily prudently person would, he has fulfilled his whole duty, and is not liable for an injury resulting to a co-servant when he has used this degree of caution, though by the exercise of extraordinary care the incompetency of the servant might have been discovered or the injury otherwise averted.⁵ And the presumption that the master has exercised the necessary care in the selection of his servants always arises; and in

¹ *Wiggett v. Fox*, 36 E. L. & Eq. 486; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Farwell v. Boston & W. R. R. Co.*, 4 Metc. (Mass.) 49; *Randleson v. Murray*, 8 Ad. & E. 109; *Manville v. Cleveland & T. R. R. Co.*, 11 Ohio St. 417; *Walkowski v. Penokee & G. Consolidated Mines (Mich.)*, 73 N. W. Rep. 895; *Kansas & Texas Coal Co. v. Brownlie*, 60 Ark. 582, 31 S. W. Rep. 453; *Faulkner v. Erie R. R. Co.*, 49 Barb. 324; *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 233; *Thayer v. St. Louis & C. R. R. Co.*, 22 Ind. 26; *Curley v. Harris*, 11 Allen (Mass.), 112, 121; *Ponton v. Railway Co.*, 6 Jones (N. C. Law), 245; *Caldwell v. Brown*, 53 Pa. St. 453; *Blake v. Maine Cent. R. R. Co.*, 70 Me. 60; *Harper v. Indianapolis & St. L. R. R. Co.*, 47 Mo. 567; *Melville v. Missouri River, F. S. & G. R. R. Co.*, 48 Fed. Rep. 820; *King v. Boston & W. R. R. Co.*, 9

Cush. (Mass.) 112; *Warner v. Erie Ry. Co.*, 39 N. Y. 468; *Lawler v. Androscoggin R. R. Co.*, 62 Me. 463; *Chandler v. Atlantic Coast E. Ry. Co. (N. J. Law)*, 39 Atl. Rep. 674.

² *Walkowski v. Penokee & G. Consolidated Mines (Mich.)*, 73 N. W. Rep. 895; *Chapman v. Railway Co.*, 55 N. Y. 579; *Cameron v. New York C. & H. R. R. Co.*, 145 N. Y. 400, 40 N. E. Rep. 1.

³ *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. Rep. 937; *Walkowski v. Penokee & G. Consolidated Mines (Mich.)*, 73 N. W. Rep. 895; *Rohback v. Pacific R. R. Co.*, 43 Mo. 189; *Kroy v. Chicago, R. I. & Pac. R. Co.*, 32 Iowa, 357; *Farwell v. Boston & W. R. R. Corp.*, 4 Metc. (Mass.) 49.

⁴ *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. Rep. 937.

⁵ *Caldwell v. Brown*, 53 Pa. St. 458.

order to recover because of a contrary condition of things, the *onus* is on the party seeking the recovery to prove affirmatively this want of care and prudence on the part of the master.¹

§ 811. Duty of master to employ competent servants — Minors — Presumption from employment of.—While it would be negligence *per se* in a master to employ a person manifestly so young that he could not, in the nature of things, have any intelligent comprehension of the duties for which he is engaged, yet the fact that the master employs a minor raises no presumption of negligence whatever, unless the minor be so young as not to be competent to perform his service by reason of his immaturity. The mere fact, therefore, that an infant is employed is no evidence of negligence in the master in the selection of his servant, unless it be made to appear that he was too young to understand and perform the service for which he is engaged. His minority alone is not sufficient for this purpose.² There is no particular age which the law fixes as requisite to the employment of a competent servant, though as a general rule the law presumes that a child under fourteen is incapable of performing with skill and reasonable safety the ordinary duties of a servant. When a man has employed a servant so young, the law imposes upon him the burden of showing that the servant possesses the requisite skill and ability, and if he fails so to do, the presumption is that the servant is not competent.³ And usually the degree of care to be exercised by the master in this respect must be commensurate with the uncertainty of the necessary intelligence of the child, taking his age into consideration.⁴

§ 812. Duty to employ competent servants — Liability where the authority to employ is delegated to another.—The master need not necessarily employ his servants personally,

¹ *Brothers v. Carter*, 52 Mo. 372; *Sutherland v. Troy & B. R. R. Co.*, 125 N. Y. 737, 26 N. E. Rep. 609; *McGinnis v. Canada Southern Bridge Co.*, 114 Ill. 244, 2 N. E. Rep. 185.

² *Kansas & Texas Coal Co. v. Brownlie*, 60 Ark. 582, 31 S. W. Rep. 453; 49 Mich. 466, 18 N. W. Rep. 819.

³ *Molaske v. Ohio Coal Co.*, 86 Wis. 220, 56 N. W. Rep. 475.

⁴ *Larson v. Berquist*, 34 Kan. 334, 8 Pac. Rep. 407.

but he may authorize another to do so for him. Indeed, nothing is more common in cases of large enterprises of any kind where very many servants of many grades must be had. But when the master thus delegates to another the authority to engage servants, the person thus authorized is an agent or vice-principal of the master. His acts in employing servants are the acts of the master, just as the acts of an agent are those of the principal, and are binding on him accordingly.¹ This is true, though the vice-principal engage the servant only temporarily, and no charge is made for the service. Such person is nevertheless the servant of the master for the time being.² Whether the relationship of master and servant arises by virtue of the employment of the servant by another acting for the master will be a question of fact, either as to the actual hiring or the authority of the representative of the master to hire servants for his principal, when the facts and circumstances are such as to admit of different intelligent conclusions.³

§ 813. Necessary care in selecting servants — What sufficient.— When the master, in selecting a servant, makes diligent inquiry and carefully investigates the fitness and competency of the servant whom he employs, he has done all the law requires of him in this respect. This is all that good faith and reasonable diligence require, and when the master faithfully investigates as to such facts he will not be liable to another servant for an injury arising from a neglect of duty or act of incompetency or inefficiency on the part of the servant so selected.⁴

§ 814. Liability of master for injury to servant resulting from negligence of master.— Among other duties which a master owes his servant is that of protecting him from any injury that might be the result of negligence on the part of the

¹ *Fifield v. Northern R. R.*, 42 N. H. 225; *Corcoran v. Holbrook*, 59 N. Y. 517; *Dobbin v. Richmond & D. R. R. Co.*, 81 N. C. 446, 450; *Atchison, T. & S. F. R. R. Co. v. Moore*, 29 Kan. 632; *Laning v. New York Cent. R. R. Co.*, 49 N. Y. 521; *McIntire Ry. Co. v. Bolton*, 43 Ohio St. 224, 1 N. E. Rep. 333.

² *Johnson v. Ashland Water Co.*, 71 Wis. 553, 37 N. W. Rep. 823.

³ *Brophy v. Bartlett*, 108 N. Y. 632, 15 N. E. Rep. 368. See also *Goldman v. Mason*, 2 N. Y. S. 337.

⁴ *Union Pac. R. R. Co. v. Milliken*, 8 Kan. 647; *Moss v. Pacific R. R. Co.*, 49 Mo. 167; *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.) 49.

master. The master is liable to his servant for any injury arising from his negligence. This is an elementary proposition of law, and is well fortified by common sense.¹ But the negligence of the master is never presumed, and it is incumbent on the servant seeking to recover by reason of such negligence to make this appear by affirmative proof.² Of course the law will not permit a master to evade responsibility for his negligence by delegating to others the authority to act in his stead in the management of his business.³ If the evidence be such as to warrant the conclusion that the master was or was not negligent, the issue of negligence then becomes one of fact.⁴

§ 815. Liability of master for injuries to servant arising from the employment — Obvious dangers.—The dangers incident to the employment of a servant which are obvious and apparent to any person of ordinary prudence and caution are not chargeable to the master. These being apparent to the servant, it is thought best to relieve the master from liability because, on the one hand, the servant might be otherwise unduly indifferent or reckless for his personal safety, and, on the other, the liability might have the effect of practically prohibiting the service by reason of the possibility of heavy damages far out of proportion to the benefit the master might receive.⁵

¹ *Burlington & M. R. R. Co. v. Crockett*, 19 Neb. 138, 26 N. W. Rep. 921; *Witte v. Hague*, 2 Dow. & Ry. 33; *Keegan v. Western R. R. Corp.*, 8 N. Y. 175; *Rosecranes v. Iowa & M. Tel. Co.*, 65 Iowa, 444, 21 N. W. Rep. 769; *Peck v. Michigan Cent. R. R.*, 57 Mich. 3, 23 N. W. Rep. 466; *Harriman v. Pittsburg, C. & St. L. R. R. Co.*, 45 Ohio St. 11, 12 N. E. Rep. 455; *McMillan v. Saratoga & W. R. R. Co.*, 20 Barb. 449; *Wright v. New York C. & R. R. Co.*, 28 Barb. 80; *Galveston, H. & S. A. Ry. Co. v. Davis* (Tex. Civ. App.), 45 S. W. Rep. 956; *Troxler v. Southern Ry. Co. (N. C.)*, 30 S. E. Rep. 117; *Continental Trust Co. v. Toledo, St. L. & K. C. R. R. Co.*, 87 Fed. Rep. 133.

² *Beauleau v. Portland Co.*, 48 Me. 291.

³ *Sanborn v. Madera Flume & T. Co.*, 70 Cal. 261, 11 Pac. Rep. 710; *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. Rep. 1094.

⁴ *Wright v. Southern Ry. Co. (N. C.)*, 30 S. E. Rep. 348.

⁵ *Tuttle v. Detroit, G. H. & M. Ry. Co.*, 122 U. S. 189, 7 Sup. Ct. Rep. 1166; *Randall v. Baltimore & O. R. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *American Dredging Co. v. Walls*, 84 Fed. Rep. 428; *Kahn v. McNulta*, 147 U. S. 241, 13 Sup. Ct. Rep. 298; *Quincy Mining Co. v. Kitts*, 42 Mich. 34, 3 N. W. Rep. 240; *Sweeney v. Berlin & J. Env. Co.*, 101 N. Y. 520, 5 N. E. Rep. 358; *Learly v. Boston & A. R. R. Co.*, 139 Mass. 580, 2 N. E. Rep. 115; *Atchison, T. & S. F. R. R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. Rep. 204; *Walsh v. Whitley*, 21 Q. B. Div. 371; *Hay*

If the servant wishes to fix the liability upon the master for any injury to his person by reason of his service, he must call the attention of the master to the obviously dangerous appliance. If the master agrees to fix the same, the servant may continue work upon this assurance; but if he does not, and the servant, knowing the apparent danger, continues in the service and is thereby injured, the loss must fall upon him, not the master.¹

§ 816. Duty to select safe appliances — New machinery — General rule.— While it is the duty, ordinarily, of the master to furnish safe appliances for his servant to work in safety as far as the character of the service will permit, yet it is not his duty, necessarily, to always furnish the newest and most recent tools or machinery. There are various reasons why he need not do this. In the first place, he would have to discard, perhaps at a great loss, the appliances in use, when he might be able to prosecute his business with reasonable safety without a change. There might be cases in which it would so cripple his business as to hazard his solvency. The general rule, therefore, seems to be that, unless it would be to the interest and advantage of the master to supplant his old appliances with new and improved working tools, and unless the retention of the old machinery or other working implements would make the service materially more dangerous, and the new could be substituted for the old without material injury to the master, he is not bound in law to always have the newest machinery known.² On the other hand, it is the duty of the master to

den v. Smithville Mfg. Co., 29 Conn. 548; De Forest v. Jewett, 88 N. Y. 264; Gibson v. Erie Ry. Co., 63 N. Y. 449; Hodgkins v. Railroad Co., 119 Mass. 419; Washington & G. R. R. Co. v. McDade, 135 U. S. 570, 10 Sup. Ct. Rep. 1044; Lopez v. Central Ariz. Min. Co., 1 Ariz. 464, 2 Pac. Rep. 748; Halliburton v. Wabash R. R. Co., 58 Mo. App. 27; Stewart v. Ohio River R. R. Co., 40 W. Va. 188, 20 S. E. Rep. 922; Quinn v. Johnson Forge Co., 9 Houst. (Del.) 338, 32 Atl. Rep. 858; Maloney v. U. S. Rubber Co. (Mass.), 47 N. E. Rep. 176; Stockwell v. Chicago & N. W. Ry. Co. (Iowa), 75 N. W. Rep. 665.

¹ Southern Pac. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. Rep. 530. reversing same case in 6 Utah, 319, 23 Pac. Rep. 751; Alexander v. Tennessee & Los Cerrillos G. & S. Min. Co., 3 N. M. 173, 3 Pac. Rep. 733; Ford v. Chicago, R. I. & Pac. Ry. Co. (Iowa), 73 N. W. Rep. 650.

² McGinnis v. Canada Southern Bridge Co., 49 Mich. 466, 13 N. W. Rep. 819; Hickey v. Taaffe, 105 N. Y.

adopt any and all new appliances which have been duly tested and found to diminish danger and protect those from injury whom he is bound in law to protect as far as he reasonably can, and when it is within the ability of the master so to do without material injury to himself from a business and financial standpoint.¹ Upon this principle it is held in a recent case that it is negligence in a railroad not to furnish modern coupling facilities when such devices could be had at a price that would not be seriously inconvenient, and that the master would be liable for an injury to a servant on account of the old and dangerous system of coupling.²

§ 817. Safe appliances — Duty of master to furnish.— The law enjoins upon the master the duty of furnishing for his servant reasonably safe appliances with which to perform his duties.³ But while he must do this, he need not buy a particular kind of machinery or appliance, nor even the very best and most approved kind, for the use of his servant. As expressed in the language of the supreme court of the United States: "Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees, nor are they bound to supply the best, safest and newest of these appliances for the purpose of securing the safety of those who are thus employed."⁴ In the nature of things the master

28. 12 N. E. Rep. 286; *Larimer v. St. Paul City Ry. Co.*, 48 Minn. 391, 51 N. W. Rep. 125.

¹ *Smith v. New York & Harlem R. Co.*, 19 N. Y. 127.

² *Greenlee v. Southern Ry. Co.* (N. C.), 30 S. E. Rep. 115.

³ *Noyes v. Smith*, 28 Vt. 59; *Lanning v. New York C. R. R. Co.*, 49 N. Y. 521; *Simmons v. Chicago & T. R. R. Co.*, 110 Ill. 340; *Seaver v. Boston & Me. R. R. Co.*, 14 Gray (Mass.), 466.

⁴ *Washington & D. R. R. Co. v. McDaniel*, 135 U. S. 570, 10 Sup. Ct. Rep. 1044; *Southern Pac. Co. v. Seley*, 132 U. S. 145, 14 Sup. Ct. Rep. 530; *Shadford v. Ann Arbor St. Ry. Co.* (Mich.), 69 N. W. Rep. 661; *Belleville*

Pump & S. Works v. Bender, 69 Ill. App. 189; *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. Rep. 869; *Gulf, C. & S. F. Ry. Co. v. Warner* (Tex. Civ. App.), 36 S. W. Rep. 118; *Cowan v. Umbagog Pulp Co.* (Me.), 39 Atl. Rep. 340; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 418; *Lake Shore & M. S. Ry. Co. v. McCormick*, 74 Ind. 445; *Simmons v. Chicago & T. R. R. Co.*, 110 Ill. 340; *Chicago, R. I. & Pac. Ry. Co. v. Lonergan*, 118 Ill. 41, 7 N. E. Rep. 55; *Smith v. St. Louis K. C. & N. Ry. Co.*, 69 Mo. 32; *McGinnis v. Canada Southern Bridge Co.*, 49 Mich. 466, 13 N. W. Rep. 519; *The Neptune*, 30 Fed. Rep. 925; *Atchison, T. & S. F. Ry. Co. v. McKee*, 37 Kan. 592, 15

cannot be expected to exercise superhuman wisdom in selecting appliances. He cannot foretell a possible latent danger, and is not expected to do so. When he has used reasonable diligence in the selection of tools and appliances, whereby it is reasonably probable that no injury will occur to a servant by reason of the selection, he has performed every duty the law requires of him in this particular.¹ The law implies no warranty that the judgment of the master in making his selection is infallible.²

§ 818. Assumption of dangers — Liability of master — Ignorance of servant of dangers.—The servant must know the danger of his employment, being of sufficient age to comprehend the same, ordinarily, at his peril. It is not enough that he be ignorant of any danger. The danger may be obvious to any one of ordinary intelligence and yet unknown to the servant. But he must take notice at his peril of the things about his employment that are obviously dangerous or hazardous. The master has a right to rely upon the presumption that he will do so, and the law requires that this ordinary prudence on the part of the servant be exercised.³ The servant,

Pac. Rep. 484; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Mullan v. Philadelphia & South M. S. S. Co.*, 78 Pa. St. 25; *Priestly v. Fowler*, 3 M. & W. 1; *International & G. N. Ry. Co. v. Williams*, 82 Tex. 342, 18 S. W. Rep. 700; *Ill. Cent. Ry. Co. v. Price*, 72 Miss. 862, 18 S. Rep. 415.

¹ *Wonder v. Baltimore & O. R. R. Co.*, 32 Md. 411; *Little Rock & Ft. S. R. R. Co. v. Duffey*, 35 Ark. 602; *St. Louis S. W. Ry. Co. v. Jagerman*, 59 Ark. 98, 26 S. W. Rep. 591; *Missouri, K. & T. Ry. Co. v. Woods* (Tex. Civ. App.), 25 S. W. Rep. 741; *Fifield v. Northern R. R. Co.*, 42 N. H. 225; *Hurd v. Vermont & C. R. R. Co.*, 32 Vt. 473; *Mobile & O. R. R. Co. v. Thomas*, 42 Ala. 672; *St. Louis, I. M. & S. Ry. Co. v. Harper*, 44 Ark. 524; *The Flowergate*, 31 Fed. Rep. 762; *Robertson v. Cornelson*, 34 Fed. Rep. 716; *Little Rock & Ft. S. Ry. Co. v. Eubanks*, 48 Ark. 460; *Gulf, C. & S.*

F. Ry. Co. v. McNeil (Tex. Civ. App.), 25 S. W. Rep. 647.

² *Wonder v. Baltimore & O. R. R. Co.*, 32 Md. 411; *Little Rock & Ft. S. R. R. Co. v. Duffey*, 35 Ark. 602.

³ *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 418; *Watson v. Kansas & Texas Coal Co.*, 52 Mo. App. 366; *Washington & G. R. R. Co. v. McDade*, 135 U. S. 570, 10 Sup. Ct. Rep. 1044; *Fraker v. St. Paul, M. & M. Ry. Co.*, 32 Minn. 54, 19 N. W. Rep. 349; *Schultz v. Johnson*, 7 Wash. 403, 35 Pac. Rep. 130; *Chesapeake, O. & S. W. R. R. Co. v. McDowell* (Ky.), 24 S. W. Rep. 607; *Watts v. Hart*, 7 Wash. 178, 34 Pac. Rep. 423; *Gulf, C. & S. F. Ry. Co. v. Kizziah*, 86 Tex. 81, 23 S. W. Rep. 578; *Baker v. Allegheny R. R. Co.*, 95 Pa. St. 211; *Northern Cent. Ry. Co. v. Hussom*, 101 Pa. St. 1; *Coombs v. New Bedford Cordage Co.*, 12 Mass. 572; *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind. 447; *St.*

however, only assumes the obvious dangers of the particular work he engages to perform; and if he is placed at other work by the master which is attended by latent dangers of which the servant is not familiar, the master must instruct him in regard to such dangers, to the end that he may prudently and intelligently avoid injury.¹ The same is true, indeed, where the latent danger attends the work for which the servant is hired. He does not assume the hazard of any employment except the obvious dangers. If there be latent or hidden danger which is unknown to him, but known to the master, the master must inform the servant thereof, to the end that he may elect whether he will undertake the employment or not. If he fails to do this and the servant is injured by reason of the hidden danger, the master will be liable.² If the latent danger be unknown to both parties and the master is not otherwise at fault, he will not be liable.³

§ 819. Duty of master to instruct servant in the use of dangerous machinery.—It is the duty of the master employing a servant who is ignorant of the dangers of the machinery or appliances which the servant is to use or operate to properly instruct him as to the dangers and hazards incident to the work. Of course if the servant be familiar with the machinery, there could be no use in showing him the dangers or mode of operating. But the servant who is not thus skilled in the operation of the appliances he is employed to use has a right to expect and receive from the master such

Louis, *I. M. & S. Ry. Co. v. Davis*, 54 Ark. 389, 15 S. W. Rep. 895; *Diehl v. Lehigh Iron Co.*, 140 Pa. St. 487, 21 Atl. Rep. 430; *Sweeney v. Berlin & Jones Env. Co.*, 101 N. Y. 520, 5 N. E. Rep. 358; *Gibson v. Erie Ry. Co.*, 63 N. Y. 449; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 48; *De Forrest v. Jewett*, 88 N. Y. 264; *Chicago, R. I. & Pac. Ry. Co. v. Lonergan*, 118 Ill. 41, 7 N. E. Rep. 55; *Grand v. Michigan Cent. R. R. Co.*, 83 Mich. 564, 47 N. W. Rep. 837; *Simmons v. Chicago & T. R. R. Co.*, 110 Ill. 340; *Clark v. Chicago, B. & Q. R. R. Co.*, 92 Ill. 43; *Knight v. Cooper*, 36 W. Va. 232, 14

S. E. Rep. 999; *Mellville v. Missouri River, F. S. & G. R. R. Co.*, 43 Fed. Rep. 820; *Borden v. Daisy Roller Mill Co. (Wis.)*, 73 N. W. Rep. 91; *Missouri, K. & T. Ry. Co. v. Hauer* (Tex. Civ. App.), 43 S. W. Rep. 1078; *Pierce v. Clavin*, 82 Fed. Rep. 550; *Yuger's Adm'r v. Receivers*, 88 Fed. Rep. 773; *Hardy v. Boston & M. R. R. (N. H.)*, 41 Atl. Rep. 179.

¹*Pittsburg, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151, 5 N. E. Rep. 187.

²*Perry v. Marsh*, 25 Ala. 659.

³*Mad River & L. E. R. R. Co. v. Barber*, 5 Ohio St. 541.

instructions and directions as will enable him to fully appreciate the danger of operating the machinery, especially the latent dangers.¹ As to when a servant is entitled to such instruction will depend upon many circumstances. If he be a mature person and have intelligence and experience, it may not be necessary to instruct him at all; while in the case of an infant of little or no experience, the duty of instruction would become correspondingly more important. It follows, therefore, that this must usually be a question of fact to be determined from all the circumstances surrounding each particular case, taking into consideration the age and experience of the servant, the character of the machinery and all the surrounding conditions.² The duty to properly instruct an inexperienced infant exists whether the instruction be requested by him or not;³ and the required instruction is such as will enable a person to intelligently appreciate the nature of the danger attending the performance of the service.⁴ That an infant is over fourteen years of age does not raise any presumption that he needs no instruction with reference to his duties.⁵ The rule as to the duty of the master to instruct his servant seems to have been well stated by the supreme court of Pennsylvania in the following language: "When young persons, without experience, are employed to work with dangerous machinery, it is the duty of the employer to give suitable instructions as to the manner

¹ *Wheeler v. Wason*, 135 Mass. 294; *Howard Oil Co. v. Farmer*, 56 Tex. 301; *Parkhurst v. Johnson*, 50 Mich. 70, 15 N. W. Rep. 107; *Union Pac. R. Co. v. Fort*, 84 U. S. 553; *Cook v. St. Paul, M. & M. Ry. Co.*, 34 Minn. 45, 24 N. W. Rep. 311; *Ryan v. Fowler*, 24 N. Y. 410; *Swoboda v. Ward*, 40 Mich. 420; *Louisville, N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 18, 9 N. E. Rep. 594; *Dowling v. Allen*, 74 Mo. 13; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Louisville & N. R. R. Co. v. Binion*, 107 Ala. 645, 18 S. Rep. 75.

² *Atlanta & W. P. R. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. Rep. 763; *De Lozier v. Kentucky Lumber Co. (Ky.)*, 18 S. W. Rep. 451; *Texas & Pac. Ry. Co. v. Brick*, 83 Tex. 598, 20 S. W. Rep. 511; *Grizzle v. Frost*, 3 Fost. &

Fin. (N. P.) 622; *Prentiss v. Kent Furniture Mfg. Co.*, 63 Mich. 478, 30 N. W. Rep. 109; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. Rep. 286; *Steiler v. Hart*, 65 Mich. 644, 32 N. W. Rep. 875; *Gamble v. Hine*, 2 N. Y. S. 778; *Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. Rep. 910.

³ *Jones v. Florence Mining Co.*, 66 Wis. 268, 28 N. E. Rep. 207.

⁴ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Robertson v. Cornelison*, 34 Fed. Rep. 716; *Emma Cotton Seed Oil Co. v. Hale*, 56 Ark. 232, 19 S. W. Rep. 600.

⁵ *Atlanta & W. P. R. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. Rep. 763; *White v. San Antonio Water-works Co.*, 9 Tex. Civ. App. 465, 20 S. W. Rep. 253.

of using it, and warning as to the hazard of carelessness in its use. If the employer neglects this duty, or if he give improper instructions, he is responsible for the injury resulting from his neglect of duty. He is not answerable for injury to adults, nor for injuries to young persons who have had that experience from which knowledge of danger may reasonably be presumed, or that discretion which prompts to care."¹ Generally, whether the master should have instructed the infant, and to what extent, will be a question of fact to be determined from the age of the infant and the nature and danger of the service.² But the mere fact that an injury occurs to a servant while on duty for his master raises no presumption of negligence on the part of the latter, whether the servant be young or old. This must be established by allegation and proof.³

§ 820. Duty of master to furnish safe appliances — Rule where servant continues work with knowledge of danger.— While it is the duty of the master to furnish his servant with a safe place to work, and with safe tools and appliances, as well as to select only competent and proper fellow-servants, yet if the servant knows of the unsafe or dangerous character of his work by reason of the neglect of duty of the master in any of these particulars, and nevertheless continues to work without complaint, or after complaint and without promise or assurance from the master that the neglected duty, the observance of which the law enjoins upon him, will have proper attention, he cannot recover for an injury arising from such neglect on the part of the master.⁴ The duty of the servant in such cases

¹ Tagg v. McGeorge, 155 Pa. St. 368, 26 Atl. Rep. 671; White v. San Antonio Water-works Co., 9 Tex. Civ. App. 465, 29 S. W. Rep. 253; Rummell v. Dilworth, 131 Pa. St. 509, 19 Atl. Rep. 345. And see Hettchen v. Chipman (Md.), 41 Atl. Rep. 65.

² Texas & Pac. Ry. Co. v. Brick, 83 Tex. 598, 20 S. W. Rep. 511; White v. San Antonio Water-works Co., 9 Tex. Civ. App. 465, 29 S. W. Rep. 252; Harris v. Shebeck, 151 Ill. 287, 37 N. E. Rep. 1015; Turner v. Norfolk & W. R. R. Co., 40 W. Va. 675, 22 S. E. Rep.

83; Chopin v. Paper Co., 83 Wis. 192, 53 N. W. Rep. 452; Luebke v. Berlin Machine Works, 88 Wis. 442, 60 N. W. Rep. 711; Barg v. Bousfield, 65 Minn. 355, 68 N. W. Rep. 45; Kilgallon v. Delaware & H. Canal Co., 174 Pa. St. 392, 34 Atl. Rep. 597.

³ Stewart v. Ohio River R. R. Co., 40 W. Va. 188, 20 S. E. Rep. 922.

⁴ Assop v. Yates, 2 Hurl. & Nor. 767; Frazier v. Pennsylvania R. R. Co., 38 Pa. St. 104; Bridges v. Tenn. C., I. & R. R. Co., 109 Ala. 287, 19 S. Rep. 494.

would be to make complaint to the master of the danger, and if the latter should refuse to perform his legal duty in furnishing safe appliances the servant would have a right, and it would be his duty, to quit the employment. If the employer agrees, however, to remedy any defect or want of such safety as is ordinarily compatible with the use of the machinery or appliances, the servant may continue work upon this assurance, and if, after such promise on the part of the master to remedy any defect, the servant is injured by reason thereof, the master will be liable therefor.¹ But the servant must not continue the use of the defective appliances beyond the time in which the master agreed to repair the same, if this is assured by the master within a time certain; and if no time is stated, a reasonable time will be presumed, and the servant cannot use the appliances beyond the reasonable time except at his own peril.² The servant, however, is not bound to look for latent defects. He is only chargeable with notice of such apparent defects as are patent on ordinary observation.³ The same rule applies to latent dangers attending the use of appliances. It is only when the servant knows or should know the danger that the master will be absolved from liability for an injury to a servant resulting from the danger.⁴

§ 821. Duty of master to select safe appliances — Question of fact.— While the master is not liable to a servant who has been injured by reason of a failure to select suitable appliances with which to work, yet he is liable when he is culpably negligent in making such selection whereby a servant is injured. It may often be a difficult matter to determine when a master is or is not liable under this rule. The law itself is very clear

¹ *Eureka Co. v. Bass*, 81 Ala. 200, 8 S. Rep. 216; *Bridges v. Tenn. C., L. & R. R. Co.*, 109 Ala. 287, 19 S. Rep. 494; *East Chicago Iron & S. Co. v. Williams*, 17 Ind. App. 573, 47 N. E. Rep. 26; *Rodgers v. Leyden*, 127 Ind. 50, 26 N. E. Rep. 210; *Meyer v. Gundlack-Nelson Mfg. Co.*, 67 Mo. App. 389; *Swift v. Madden*, 165 Ill. 41, 45 N. E. Rep. 979.

² *Eureka Co. v. Bass*, 81 Ala. 200, 8 S. Rep. 216; *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300, 9 S. Rep. 252.

³ *Faren v. Sellers*, 39 La. Ann. 1011, 3 S. Rep. 363; *Standard Oil Co. v. Helmick*, 148 Ind. 457, 47 N. E. Rep. 14.

⁴ *Westilla v. Duluth Lumber Co.*, 37 Minn. 153, 33 N. W. Rep. 551; *Faren v. Sellers*, 39 La. Ann. 1011, 3 S. Rep. 363; *Scanlon v. Boston & A. R. R. Co.*, 147 Mass. 484, 18 N. E. Rep. 209; *Pidcock v. Union Pac. Ry. Co.*, 5 Utah, 612, 19 Pac. Rep. 191.

and positive, but instances may arise when the facts upon which the law must be predicated are not so clear. Indeed it is often the case that the question, as one of fact, might consistently be determined either way by persons of good common sense and intelligence. When this is the case, "the jury are to inquire whether, under the circumstances proved, the master did anything which, in the exercise of reasonable and ordinary care and prudence, he ought not to have done, or omitted any precaution which a prudent and careful man would or ought to have taken," and make up their conclusion after following these principles for a guide.¹ And where the master fails to comply with the legal duty to furnish his servants with safe appliances, he cannot defeat a recovery for an injury to a servant on the ground that a co-servant may have been guilty of negligence.² Nor can he shield himself from the duties and liabilities imposed on him by law in this respect by delegating to another the authority to attend to such matters in his stead.³

§ 822. Injury to servant—Contributory negligence.—The servant, in order to insure a right for the redress of an injury, must himself be free from fault. He cannot, by his own negligence, invite the injury, as it were, and, thus assisting in bringing it about, sue the master for the damages resulting therefrom. It is not enough that the master be negligent: the servant must be free from contributory negligence.⁴ But in

¹ Leonard v. Collins, 70 N. Y. 90; Little Rock & Ft. S. R. R. Co. v. Duffey, 35 Ark. 602; Baker v. Allegheny Val. R. R. Co., 95 Pa. St. 211; Coombs v. New Bedford Cordage Co., 102 Mass. 572; Hannibal & St. J. R. R. Co. v. Fox, 31 Kan. 586, 3 Pac. Rep. 320; Conner v. Pioneer Const. Fire Proof Co., 29 Fed. Rep. 629; Tabler v. Hannibal & St. J. Ry. Co., 93 Mo. 79, 5 S. W. Rep. 810; Nelson v. Lumberman's Mining Co., 65 Mich. 288, 32 N. W. Rep. 438; Hageman v. Western R. R. Corp., 13 N. Y. 9. See also Shute v. Exeter Mfg. Co. (N. H.), 40 Atl. Rep. 391.

² Cunningham v. Union Pac. Ry. Co., 4 Utah, 206, 7 Pac. Rep. 795.

³ Norfolk & W. R. R. Co. v. Ampey, 93 Va. 108, 25 S. E. Rep. 226; Northern Pac. R. R. Co. v. Charles, 7 U. S. App. 359, 2 C. C. A. 330, 51 Fed. Rep. 562; Pullman's Palace Car Co. v. Laack, 143 Ill. 232, 32 N. E. Rep. 281; Kimmer v. Webber, 76 Hun. 482, 27 N. Y. S. 1093; Tex. & Pac. Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. Rep. 107; Rollings v. Levering, 18 App. Div. 223, 45 N. Y. S. 942; Ogle v. Jones, 16 Wash. 319, 47 Pac. Rep. 747; Eingartner v. Illinois Steel Co., 94 Wis. 70, 68 N. W. Rep. 664; Spaulding v. Forbes Lithograph Mfg. Co. (Mass.), 50 N. E. Rep. 543.

⁴ Atlas Engine Works v. Randall, 100 Ind. 293; Thompson v. Flint, 57

actions by the servant for injury resulting from the negligence of the master, it is not required that the servant allege and prove himself free from contributory negligence. This is matter of defense, and must be set up and proved by the master, otherwise it will not be available.¹ In other words, the law presumes the exercise of due care on the part of the servant, and the burden is on the master to overcome this presumption of fact by affirmative evidence.² The degree of proof necessary to defeat a recovery because of contributory negligence must be such that will make a preponderance of the evidence in favor of this contention.³ But, of course, where the evidence of the plaintiff establishes his own contributory negligence by the required standard, it will not then be required of the defendant that he establish it, for the servant has thus made it unnecessary.⁴

Mich. 300, 23 N. W. Rep. 820; St. Louis, I. M. & S. Ry. Co. v. Ferguson, 65 Ark. 126, 44 S. W. Rep. 1123; Pittston Coal Co. v. McNulty, 120 Pa. St. 414, 14 Atl. Rep. 387; Stacklie v. St. Paul & D. R. R. Co. (Minn.), 75 N. W. Rep. 734; Brown v. Wilmington City Ry. Co. (Del.), 40 Atl. Rep. 936; Smith v. Electric Traction Co. (Pa.), 40 Atl. Rep. 966; McCann v. Atlantic Mills (R. I.), 40 Atl. Rep. 500; McDonnell v. Illinois Cent. R. R. Co. (Iowa), 75 N. W. Rep. 336; The Saratoga, 87 Fed. Rep. 349.

¹ Houston & T. C. Ry. Co. v. O'Neal (Tex. Civ. App.), 45 S. W. Rep. 921; Gulf, C. & S. F. Ry. Co. v. Williams, 69 Tex. 159, 7 S. W. Rep. 88; O'Connor v. Missouri Pac. Ry. Co., 94 Mo. 150, 7 S. W. Rep. 106; Thorpe v. Missouri Pac. Ry. Co., 89 Mo. 650, 2 S. W. Rep. 3; Clark v. Chicago, M. & St. Paul Ry. Co., 28 Minn. 69, 9 S. W. Rep. 75; Kelley v. Chicago & N. W. Ry. Co., 60 Wis. 480, 19 N. W. Rep. 521; Gill v. Homrighausen, 79 Wis. 634, 48 N. W. Rep. 862; Amato v. Northern Pac. R. R. Co., 46 Fed. Rep. 561.

² Houston & T. C. Ry. Co. v. Cowser, 57 Tex. 293; Dallas & W. Ry. Co. v. Spicker, 61 Tex. 427; Gulf, C. & S.

F. Ry. Co. v. Shieder, 88 Tex. 152, 30 S. W. Rep. 902; Lee v. International, etc. R. R. Co., 88 Tex. 583, 36 S. W. Rep. 63; Gulf, C. & S. F. Ry. Co. v. Redicker, 67 Tex. 189, 2 S. W. Rep. 513; San Antonio & A. P. Ry. Co. v. Bermet, 76 Tex. 153, 13 S. W. Rep. 319; Little Rock & Ft. S. Ry. Co. v. Atkins, 46 Ark. 423; Little Rock, M. R. & T. Ry. Co. v. Leverett, 48 Ark. 333, 3 S. W. Rep. 50; Hough v. Texas & P. Ry. Co., 100 U. S. 213; Jones v. Malvern Lumber Co., 58 Ark. 125, 23 S. W. Rep. 679; Lincoln v. Walker (Neb.), 20 N. W. Rep. 113; Mares v. Northern Pac. R. R. Co., 3 Dak. 336, 21 N. W. Rep. 5; Secord v. St. Paul, M. & M. Ry. Co., 28 Fed. Rep. 221; Whaley v. Bartlett, 42 S. C. 454, 20 S. E. Rep. 745.

³ Texas & St. L. Ry. Co. v. Orr, 46 Ark. 182.

⁴ St. Louis, I. M. & S. Ry. Co. v. Martin, 61 Ark. 549, 33 S. W. Rep. 1070; Union Pac. Ry. Co. v. Adams, 33 Kan. 427, 6 Pac. Rep. 529; Hoyer v. Chicago & N. W. Ry. Co., 67 Wis. 15, 29 N. W. Rep. 646; Texas & Pac. Ry. Co. v. Reed, 88 Tex. 439, 31 S. W. Rep. 1058.

§ 823. **Contributory negligence—Question of fact.**— Unless the facts in a case are so clear that there can be no question of contributory negligence, or the fact itself be admitted, the question whether a servant has been guilty of contributory negligence so as to bar his right of recovery against his master for an injury arising from the negligence of the master will be one of fact for a jury to determine.¹ “It is equally as well settled that where the facts are undisputed, and there could not, in reason and fairness, be any difference in opinion as to the conclusion to be drawn from them, the question of contributory negligence is one of law.”² And when the question thus be-

¹ *Hathaway v. East Tenn., Va. & Ga. R. R. Co.*, 29 Fed. Rep. 489; *Kansas City, Ft. S. & M. R. R. Co. v. Kirkwood*, 60 Fed. Rep. 999, 9 C. C. A. 321, 22 U. S. App. 94; *Seefeld v. Chicago, M. & St. P. Ry. Co.*, 70 Wis. 316, 35 N. W. Rep. 278; *Washington & G. R. R. Co. v. McDade*, 135 U. S. 570, 10 Sup. Ct. Rep. 1044; *Delaware, L. & W. R. R. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679; *Richmond & D. R. R. Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. Rep. 748; *St. Louis, L. M. & S. Ry. Co. v. Martin*, 61 Ark. 549, 33 S. W. Rep. 1070; *Neilson v. Hillside Coal & Iron Co.*, 163 Pa. St. 256, 31 Atl. Rep. 1091; *Cavagnaro v. Clark* (Mass.), 50 N. E. Rep. 542; *Rifley v. Minneapolis & St. L. Ry. Co.* (Minn.), 75 N. W. Rep. 704; *Fox v. Chelsea* (Mass.), 50 N. E. Rep. 622; *Folk v. Schaeffer* (Pa.), 40 Atl. Rep. 401; *Colorado Coal & Iron Co. v. Lamb*, 6 Col. App. 248, 40 Pac. Rep. 251; *Baltimore, Q. & C. R. R. Co. v. Leathers*, 12 Ind. App. 544, 40 N. E. Rep. 1094; *Pennsylvania Co. v. McCaffrey* (Ill.), 50 N. E. Rep. 713; *Kelleher v. Milwaukee & N. R. R. Co.*, 80 Wis. 584, 50 N. W. Rep. 942; *Richmond & D. R. R. Co. v. Garner*, 91 Ga. 27, 16 S. E. Rep. 110; *Hudson v. Georgia Pac. Ry. Co.*, 85 Ga. 203, 11 S. E. Rep. 605; *Bjroman v. Ft. Bragg Red Wood Co.*, 104 Cal.

626, 38 Pac. Rep. 451; *Chicago, St. L. & P. R. R. Co. v. Gross*, 133 Ill. 37, 24 N. E. Rep. 563; *McGovern v. Central Vt. R. R. Co.*, 123 N. Y. 280, 25 N. E. Rep. 373; *Dacey v. Old Colony R. R. Co.*, 153 Mass. 112, 26 N. E. Rep. 437; *Amato v. Northern Pac. R. R. Co.*, 46 Fed. Rep. 561; *Georgia Pac. Ry. Co. v. Hudson*, 89 Ga. 558, 16 S. E. Rep. 70; *Lake Shore & M. S. Ry. Co. v. Murphy*, 50 Ohio St. 135, 33 N. E. Rep. 403; *Foster v. Missouri Pac. Ry. Co.*, 115 Mo. 165, 21 S. W. Rep. 916; *O'Loughlin v. New York Cent. & H. R. R. R. Co.*, 57 Hun. 538, 34 N. Y. S. 297; *Barg v. Bonsfield*, 65 Minn. 355, 68 N. W. Rep. 45; *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300, 9 S. Rep. 252; *Laverenz v. Chicago, R. I. & Pac. R. R. Co.*, 56 Iowa. 689, 10 N. W. Rep. 268; *Rolseth v. Smith*, 38 Minn. 14, 35 N. W. Rep. 565; *Birmingham Water-Works Co. v. Hubbard*, 85 Ala. 179, 4 S. Rep. 607; *Nugent v. Boston, C. & M. R. R. Corp.*, 80 Me. 62, 13 Atl. Rep. 797; *Arkansas Telephone Co. v. Ratterree*, 57 Ark. 429, 21 S. W. Rep. 1059; *Lake Shore & M. S. R. R. Co. v. Parker*, 131 Ill. 557, 23 N. E. Rep. 237; *Winkelman & B. Drug Co. v. Colladay* (Md.), 40 Atl. Rep. 1078.

² *St. Louis, L. M. & S. Ry. Co. v. Martin*, 61 Ark. 549, 33 S. W. Rep. 1070; *Atchison, T. & S. F. R. R. Co. v. Priest*, 50 Kan. 16, 31 Pac. Rep. 674; *Delaware, L. & W. R. R. Co. v.*

comes one of law the court should direct a finding for or against the servant, as the case may be, so far as the question of contributory negligence and its controlling effect in the case is concerned. This, however, of course, would not affect other questions in the action, such as the amount of damages recoverable, nor any of the numerous other questions aside from contributory negligence which might arise.

§ 824. Criminal liability of master for acts of servant.—Not only is the master liable civilly for the acts of his servants done in the performance of his duty or by his direction, but this liability extends as well to acts of the servant so acting which amount to a violation of the law. The act of the servant being regarded in law as the act of the master, it naturally follows that when the servant violates the law, acting in the line of his duty, the master may be punished therefor.¹ Upon this principle the owner of a newspaper has been held criminally responsible for a libel published in the paper by one of his employees.² The criminal liability of the master for the acts of his servant frequently arises in case of the illegal sale of intoxicating liquors by the clerk or servant, where it is within the scope of the employment and duties of the servant to thus sell liquor for his master.³ This is true though the owner of the liquors reside and stay beyond the limits of the state in which his servant sells the liquor.⁴ But the liability of the master for these criminal acts is confined to such as the nature of the service requires to be done, and does not exist when the act of the servant is not within his line of duty or the instructions of the mas-

Cadow, 120 Pa. St. 559, 14 Atl. Rep. 450; *Emery v. Raleigh & G. R. R. Co.*, 109 N. C. 589, 14 S. E. Rep. 352; *Smith v. Richmond & D. R. R. Co.*, 99 N. C. 241, 5 S. E. Rep. 896; *Wallace v. Western N. C. R. R. Co.*, 98 N. C. 494, 4 S. E. Rep. 503; *Mann v. Belt R. R. & Stock Yard Co.*, 128 Ind. 138, 26 N. E. Rep. 819; *Apsey v. Detroit, L. & N. R. R. Co.*, 83 Mich. 440, 47 N. W. Rep. 513; *Gardner v. Detroit, L. & N. R. R. Co.*, 97 Mich. 240, 56 N. W. Rep. 603; *Grostick v. Detroit, L. & N. R. R. Co.*, 90 Mich. 594, 51 N. W. Rep. 667.

¹ *Rex v. Walter*, 3 Esp. 21; *Regina v. Dean*, 12 M. & W. 39; *State v. Dow*, 21 Vt. 484; *Johnson v. State*, 83 Ga. 553, 10 S. E. Rep. 207; *State v. Stewart*, 31 Mo. 515; *State v. Brown*, 31 Me. 520; *Dyer v. Munday* (1895), 1 Q. B. 742. See, too, *Carey v. State*, 83 Ind. 597.

² *Rex v. Walter*, 3 Esp. 21.

³ *McCutcheon v. State*, 69 Ill. 601; *Hipp v. State*, 5 Blackf. (Ind.) 149; *Anderson v. State*, 22 Ohio St. 305; *State v. McCance*, 110 Mo. 398, 19 S. W. Rep. 648.

⁴ *State v. Dow*, 21 Vt. 484.

ter. And this is true though, when the act is done, the servant is really in the employment and service of the master. In other words, the master must either authorize the criminal act or require service the performance of which necessarily amounts to a violation of law.¹ In the case of *Forrester v. State*² the defendant was indicted for unlawfully selling whiskey. The proof tended to show that he kept a servant, a rather middle-aged woman by the name of Mary, who attended to his kitchen, and, it seems, incidentally to his bar. When a customer would want whiskey the master would say, "Go to Mary." And to Mary the patron would go with very satisfactory success. In disposing of the defendant's plea of not guilty under the facts, the humorous Judge Bleckley, speaking for the court, said: "In the defendant's kitchen, by his servant, in his presence and with his co-operation, through the responses 'Go to Mary,' and 'Give the money to Mary,' the traffic was carried on. There is little doubt that the defendant was the deity of this rude shrine, and that Mary was the only ministering priestess. But if she were the divinity and he her attending spirit to warn thirsty devotees where to drink, and at whose feet to lay their tribute, he is amenable to the state as a promoter of forbidden libations. Whether in these usurped rights he was serving Mary, or Mary him, may make a difference with the gods and goddesses, but makes none with men." Many vital points of law relative to the criminal liability of the master for the acts of his servant will be found correctly stated or suggested in this brief dissertation of the distinguished jurist. Of course, where the servant does an unlawful act by reason of which his master may be punished under the criminal laws, the servant, too, is guilty, and may be likewise punished.³ This is true though the master himself be not amenable to the law.⁴ In Massachusetts there is a law forbidding the sale of liquors which provides: "Whoever, by himself or his agent or servant, shall sell or give away intoxicating liquor to any minor, or allows a minor to loiter upon the prem-

¹ *Hipp v. State*, 5 Blackf. (Ind.) 149; *Carey v. State*, 83 Ind. 597; *Pennybaker v. State*, 2 Blackf. (Ind.) 484; *Rex v. Huggins*, 2 Ld. Raym. 1574; *State v. Smith*, 10 R. I. 258; *Hanson v. State*, 43 Ind. 550; *Laner v. State*, 24 Ind. 131; *Commonwealth v. Ste-*

pherson, 153 Mass. 421, 26 N. E. Rep. 992; *Commonwealth v. Wachendorf*, 141 Mass. 270, 4 N. E. Rep. 817.

² 63 Ga. 349.

³ *Schmidt v. State*, 14 Mo. 137.

⁴ *Pennybaker v. State*, 2 Blackf. (Ind.) 484.

ises where such sales are made, shall forfeit one hundred dollars for each offense." It is held under this statute that the penalty is recoverable from the master, though the servant may have violated the law without his knowledge or consent.¹ A number of authorities hold, in cases of these illegal sales of liquors by the servant of the owner, that it is not a violation of the law, so far as the master is concerned, when made in his absence and without his knowledge, consent or authority.²

§ 825. Liability of master for crimes of servant — Authority of servant.— While a master will not usually be held criminally liable for violations of law by his servant unless he authorizes, either expressly or impliedly, or sanctions the act, yet his guilt, acting through his servant, may be shown by circumstances, just as may any crime. So it is held, where a master engages in the business of selling liquors and places his servant in charge, a *prima facie* case will be made out against the master by showing the relation of master and servant, the authority of the servant to sell, and the actual illegal sale.³ It is true, of course, that the master may show by affirmative evidence in rebuttal, that he forbade the illegal sale and did not know of or sanction it.⁴ But unless the admonition to the servant not to transgress the law be in good faith, if it be merely formal or colorable only, it will not be a defense.⁵ The fact that the servant and master were both ignorant of the fact that the act of the servant amounted to a violation of the law will not relieve the master from criminal liability.⁶ Nor will the

¹ Roberg v. Burnham, 124 Mass. 277.

² Thompson v. State, 45 Ind. 495; Hanson v. State, 43 Ind. 550; O'Leary v. State, 44 Ind. 91; Commonwealth v. Putnam, 4 Gray (Mass.), 16.

³ Anderson v. State, 22 Ohio St. 305; Commonwealth v. Nichols, 10 Metc. (Mass.) 259; State v. McCance, 110 Mo. 398, 19 S. W. Rep. 648; Loeb v. State, 75 Ga. 258; Edgar v. State, 45 Ark. 356; State v. Wentworth, 65 Me. 234; State v. Heckler, 81 Mo. 417; State v. Reiley, 75 Mo. 521.

⁴ Anderson v. State, 22 Ohio St. 305; Barnes v. State, 19 Conn. 398; State v. McCance, 110 Mo. 398, 19 S. W. Rep.

648; State v. Weber, 111 Mo. 204, 20 S. W. Rep. 33; Cloud v. State, 36 Ark. 151; State v. Heckler, 81 Mo. 417; State v. Reiley, 75 Mo. 521; State v. Shortell, 93 Mo. 123, 5 S. W. Rep. 691; Wilson v. State, 64 Ark. 586, 43 S. W. Rep. 972.

⁵ Anderson v. State, 22 Ohio St. 305.

⁶ Commonwealth v. Uhrig, 138 Mass. 492; Commonwealth v. Hallett, 103 Mass. 452; Commonwealth v. Wentworth, 118 Mass. 441; Whitten v. State, 37 Miss. 379; State v. Hartfiel, 24 Wis. 60; Ulrich v. Commonwealth, 6 Bush (Ky.), 400; Robinson v. State, 28 Ark. 641.

mere fact that the master was absent when the illegal sale was made exempt him.¹

§ 826. Duty of servant to obey master—Extent of.—The extent of the duty of the servant to obey his master goes no further than the lawful directions of the master with reference to the service, according to his contract of hire. If, therefore, the master requires the servant to do anything not properly within the scope of his employment, the servant is under no obligation to obey, and in fact should not do so if the act required be improper or unlawful. So, where the master directed his servant to shoot some cattle belonging to another, and that he would hold the servant harmless, this command did not authorize the servant to commit the deed, nor could it shield him from the civil or criminal liability therefor, or make the master responsible to him in damages for a prosecution against the servant under the criminal laws.² But the law enjoins upon the servant the duty of obeying all reasonable and proper directions of the master with reference to the service; and if the servant refuses to do this, his conduct will authorize the master to discharge him.³

§ 827. Right of master to recover for injury to servant.—When the servant is assaulted and disabled by a stranger, or is otherwise injured by a third person resulting in a loss of services, the master has his action against the wrong-doer for the value of whatever services may have been lost by reason of the wrongful act.⁴ And alluring the servant away by another, whether to work for a stranger or for other purpose, whereby the master loses the services, is actionable.⁵ So the debauching the female servant of the master affords him a cause of action for the wrong to the extent that he has thereby lost her services;⁶

¹ *Edgar v. State*, 45 Ark. 356; *Robinson v. State*, 38 Ark. 641; *Mogler v. State*, 47 Ark. 109, 14 S. W. Rep. 473; *State v. Hayes*, 67 Iowa, 27, 24 N. W. Rep. 575; *Gaiocchio v. State*, 9 Tex. App. 387; *State v. Bohles*, 1 Rice (S. C.), 145; *State v. Borgman*, 2 Nott & McC. (S. C.) 34; *State v. Baker*, 71 Mo. 475. And see, as analogous, *State v. Bacon*, 40 Vt. 456.

² *Evans v. Collier*, 80 Ga. 130, 4 S. E. Rep. 264.

³ *Pape v. Lathrope*, 18 Ind. App. 633, 46 N. E. Rep. 154.

⁴ 1 Bl. Comm. 429.

⁵ 1 Bl. Comm. 429.

⁶ *Hart v. Aldridge*, 1 Cowp. 54; *Kean v. Boycott*, 1 H. Bl. 511.

though it is held that the master cannot maintain such action after the servant pays him the forfeiture stipulated in the contract of service for leaving him, as this is presumed to be an adequate compensation for the injury, and, being compensated, he has nothing to complain of.¹

§ 828. Liability of third person employing servant.—The right of a master to the time and services of his servant or apprentice is paramount to the rights of third persons; and if a stranger entice a servant away from his master, whether to get the benefit of his services or for any other purpose, he will be liable to the master in damages for the value of the services, if he knew of the relation of master and servant.² Though while one having employed a servant not knowing that his services were engaged to another would not be liable, yet if he afterwards ascertains that the servant was in the employ of another at the time of the hiring, he would be liable to the first master for the value of the services after discovering the relationship; for then it would be the duty of the second master to discharge the servant, and thereby refrain from depriving the first of the services any longer.³ The master may elect in such cases to sue for the tort, or, waiving this, may bring *assumpsit* for the value of the services lost.⁴ That the contract between the master and servant was within the statute of frauds cannot avail the tort-feasor as a defense, for the right to plead this invalidity is a privilege personal to the immediate parties to the contract and cannot be asserted by strangers.⁵ Where the enticing is wilful and malicious the master may recover, it has been held, exemplary damages in addition to actual damages for enticing away his servant.⁶

§ 829. Right of master to defend servant.—The master occupies a kind of peculiar relation to his domestic servant, which in its confidential nature is akin to that of a parent

¹ Bird v. Randall, 1 W. Bl. 387; Bird v. Randall, 8 Burr. 1345.

² Queen v. Daniel, 6 Mod. 182; Hart v. Aldridge, 1 Cowp. 54; Duckett v. Pool, 33 S. C. 238, 11 S. E. Rep. 689; Duckett v. Pool, 34 S. C. 311, 13 S. E. Rep. 542.

³ Blake v. Lanyon, 6 T. R. 221.

⁴ Lightly v. Clouston, 1 Taunt. 112.

⁵ Duckett v. Pool, 33 S. C. 238, 11 S. E. Rep. 689.

⁶ Duckett v. Pool, 34 S. C. 311, 13 S. E. Rep. 542.

towards his child. This being true, the master may lawfully protect his servant from an assault or injury at the hands of a stranger by using all the force necessary, even to the taking of life, and the servant may likewise defend his master.¹ There is a mutuality of interest arising by operation of law from the relation of master and servant which sanctions this rule. And, of course, so soon as the relation is terminated in any way, the right of mutual protection is likewise at an end.

§ 830. Master may aid and abet his servant.— While a person cannot lawfully aid or abet a stranger in his suits, yet the confidential and interested nature of the relation of a master to his servant changes the rule, and he may interest himself actively in the litigation of his servant without being guilty of any impropriety or violation of law.²

§ 831. Character of servant — Duties and liabilities of master concerning.— At common law, when the term of service expired, no matter how faithful the servant may have been in the performance of his duty, he could not demand, as matter of right, that the master give him a recommendation or character attesting his fitness and fidelity as a servant, to enable him to get work elsewhere or for other purposes.³ Of course the master was not permitted to slander his servant by publishing to others, verbally or otherwise, false statements, in their nature and effect libelous or slanderous, whether the matter published had reference to the acts and conduct of the servant while in service or not.⁴ And if such acts be malicious and false, the servant would have his action for damages against his master.⁵ But, before a servant can maintain an action for such an injury, he must show that the character given him was known to be false, and maliciously made public.⁶ The malice, however, may be inferred from facts and circumstances.⁷

¹ *Pond v. People*, 8 Mich. 150; 1 Whart. Crim. Law (1896), § 494; Hale, P. C. 484; *Tickell v. Read*, Lofft (K. B.), 215; 1 Bl. Comm. 429.

² 1 Bl. Comm. 429; *Tallheimer v. Brickerhoff*, 8 Cowen, 623; 2 Bishop, New Crim. Law, § 128, subd. 2.

³ *Carrol v. Bird*, 3 Esp. 201.

⁴ *Weatherston v. Hawkins*, 1 T. R. 110.

⁵ *Weatherston v. Hawkins*, 1 T. R. 110; *Rogers v. Clifton*, 3 Bos. & P. 587.

⁶ *Weatherby v. Hawkins*, 1 T. R. 110.

⁷ *Rogers v. Clifton*, 3 Bos. & P. 587.

§ 832. **Apprentices.**—The relation of master and servant is usually held to exist between apprentice and master; and in nearly all civilized countries laws have been passed authorizing, if not in a sense encouraging, the apprenticing of infants to suitable persons, to the end that they may learn some useful trade, profession or occupation. Such is the law of England,¹ and is the law of the various states in this country with more or less modification. All matters pertaining to the apprenticing of minors, however, are usually governed in this country by local statute, and it is rarely that these local regulations are alike in any two states. It will not be attempted, therefore, to exhaustively review all the American statute law on the subject, nor the decisions of the various courts thereunder, but a brief and general discussion of the law of apprentice and master is thought sufficient. Perhaps the only way in which a parent may irrevocably release for a time the custody of his infant child is by indenture of apprenticeship in due form.² The master is entitled to the services of his apprentice during the period of the apprenticeship; and if a stranger or third person hire the apprentice without the knowledge of the master, such third person will be liable to him for the value of the services of the child.* And this is true though the stranger may not have known the infant was an apprentice.³ Of course a stranger, unless expressly authorized by statute, has no right, in any case, to bind an infant as an apprentice, and an attempt by such a person so to do would be a mere nullity, which the apprentice, the master, and perhaps even the stranger himself thus intermeddling, could disregard.⁴

§ 833. **Apprenticeship — How effected.**—The contract or indenture of apprenticeship is usually effected by the execution of an instrument setting forth the purpose of the apprenticeship, prescribing the rights and duties as well as liabilities of the respective parties, which generally embrace an obligation or undertaking on the part of the master to teach the child some useful occupation or calling, give him certain instruction

¹ 1 Bl. Comm. 426.

⁴ *Butler v. Hubbard*, 5 Pick. (Mass.)

² *Fowler v. Hollenbeck*, 9 Barb. 309. 250.

³ *Bowers v. Tibbetts*, 7 Greenl. (Me.)
457; *James v. Leroy*, 6 Johns. 274.

of a designated kind, and providing that the child shall properly serve the master thus appointed over him. Sometimes, when the apprentice is a poor person and has no visible means of support, nor calling by which he may make one, it is provided by law that he be apprenticed to some suitable person, to the end that he may not become a charge upon the public, and as well that he receive the opportunity to learn some useful calling and become a useful citizen.¹ The master usually covenants to support and care for the apprentice and teach him a useful occupation.² And the indenture of apprenticeship will not be invalid, ordinarily, because it may omit to specify what trade is to be taught the infant.³ But if the parties partly perform a contract of apprenticeship which is void in law, the master cannot recover pay for the instruction and support given the child, nor can the child recover for his services for the time he has worked;⁴ that is, he could not recover by reason of the articles of apprenticeship. He would, of course, have a right of action upon a *quantum meruit* for any valuable services he may have performed for the master, at least unless such instruction, care, support and like benefits which the child may have received from the master would equal the value of the services, in which event, it would seem upon principle, that no recovery could be had. But an indenture of apprenticeship executed by the minor alone is not binding on him at common law.⁵ So articles executed by the father alone, and without the knowledge or sanction of the infant, are not, ordinarily, binding on the latter at common law.⁶ Such indentures are not voidable merely, but absolutely void.⁷ The manner and formalities necessary to constitute an apprenticeship are now very generally governed by statute in this country. The states usually have local laws vesting jurisdiction over such matters in certain courts, and prescribing the formalities and requirements necessary to a valid apprentice-

¹ 1 Bl. Comm. 426.

² Fowler v. Hollenbeck, 9 Barb. 309.

³ Fowler v. Hollenbeck, 9 Barb. 309.

⁴ Maltby v. Harwood, 12 Barb. 473; Potter v. Green, 39 Hun, 72; Harvey v. Owen, 4 Blackf. (Ind.) 337.

⁵ Harvey v. Owen, 4 Blackf. (Ind.) 337.

⁶ Stringfield v. Heiskell, 2 Yerg.

(Tenn.) 546; In re Chesterfield, 2 Salk. 459; King v. Cramford, 8 East, 25; King v. Ripon, 9 East, 295; Pierce v. Massenburg, 4 Leigh (Va.), 493.

⁷ Pierce v. Massenburg, 4 Leigh (Va.), 493; King v. Arnesby, 3 Barn. & Ald. 584.

ship. These statutes, with more or less modification, usually require that the master teach the apprentice some useful trade or calling, and some requirement of educational training and instruction is provided, such as teaching the child to read and write, spell, and other named elementary instruction.¹ When a statute designates the manner in which an apprenticeship may be entered into it must be strictly observed.²

§ 834. Apprenticeship — Scope of service.—The service which a master may exact of his apprentice is usually stipulated in the indenture or articles of apprenticeship. The master has no right to direct or require the apprentice to perform any service not properly embraced or fairly implied from the contract of apprenticeship.³ The fact that it is customary with masters to require extraordinary services of their apprentices in no manner changes the law, as custom is not permitted to supplant the positive law.⁴ It is usually a matter of statutory regulation, at this day, as to the scope of duty of an apprentice to his master. Statutes authorizing apprenticeship provide how and when the relation may be formed, prescribe the duty of the master to his apprentice, and lay down the obligations of the apprentice to the master. These local regulations should usually be consulted. And when they are not found to give the desired information, the common-law rule, that the apprentice must faithfully serve his master in all things reasonable pertaining to the service for which he has become apprenticed, and that he need not otherwise serve the master, will apply.

§ 835. Articles of apprenticeship must conform to law.—As the rights, duties and liabilities of master and apprentice are now generally laid down by statute, and as these rights and duties depend on and are governed by such provisions, it necessarily follows that articles or indentures of apprentice-

¹ See Code Miss. 1892, § 3159; Sand. Owens v. Frager, 119 Ind. 532, 21 N. & H. Dig. Ark., § 250; Moore v. Allen, E. Rep. 1115; Baker v. Lauterback, 72 Miss. 273, 16 S. Rep. 600; Rev. St. 68 Md. 64, 14 Atl. Rep. 703; State v. Tex., 1895, arts. 23-46; Commonwealth v. Coyle, 160 Pa. St. 36, 18 Reuff, 29 W. Va. 751, 2 S. E. Rep. 801. Atl. Rep. 576; Ashby v. Page, 108 N. ³ Randall v. Rotch, 12 Pick. (Mass.) C. 6, 13 S. E. Rep. 90, and many other 107. cases and statutes. ⁴ Randall v. Rotch, 12 Pick. (Mass.) 107.

² Lally v. Cantrell, 40 Mo. App. 44;

ship, in order to be valid and binding on all parties, must conform substantially to all the requirements of law.¹ But articles of apprenticeship can be avoided, as a general rule, by the infant only. As a contract, almost any agreement would bind the master, for he must be *sui juris*, generally speaking, and is presumed to be sufficiently capable of taking care of himself and his interests. The law readily gives to the infant, however, the right to repudiate the indenture if not in due form of law.² This repudiation by the child may be effected in any way by which an intent on his part is shown. No particular or formal declaration is necessary. Any act which implies the intention will usually be sufficient.³ Quitting the service of the master and engaging in service elsewhere is evidence on the part of the minor apprentice that he does not intend to be longer bound by the arrangement.⁴ But if the infant remain with his master and serve out his term of apprenticeship, though the indenture may have been avoided by him, he will be entitled to all benefits and advantages accruing by virtue of the contract.⁵ The master is generally entitled to the earnings of the apprentice during the term of apprenticeship; and if another employ the apprentice during such time, the master has his action against the stranger for the value of the services of the infant.⁶ The master may be either a natural person or a corporation. The rights, duties and liabilities of both are the same when the master is a corporation and when a natural person.⁷

§ 836. Apprenticeship — Right of master to transfer or assign his apprentice to another.— Generally speaking, a person to whom a child is apprenticed is chosen for his special fitness by the father, guardian or other person having the right to apprentice the child, and by reason of which, in the exercise of a sound discretion, he believes the best interests of the child

¹ Brown v. Whittemore, 44 N. H. 369; Page v. Marsh, 36 N. H. 305; Maltby v. Harwood, 12 Barb. 473; Harper v. Gilbert, 5 Cush. (Mass.) 417; Guthrie v. Murphy, 4 Watts (Pa.), 80; Queen v. Daniel, 6 Wend. 182.

² Brown v. Whittemore, 44 N. H. 369; Page v. Marsh, 36 N. H. 305; Fowler v. Hollenbeck, 9 Barb. 310.

³ Brown v. Whittemore, 44 N. H. 369; State v. Plaisted, 43 N. H. 413.

⁴ Brown v. Whittemore, 44 N. H. 369.

⁵ Page v. Marsh, 36 N. H. 305.

⁶ Baber v. Dennis, 6 Mod. 69.

⁷ Burnley Equitable Co-operative Soc. v. Casson (1891), 1 Q. B. 75.

will be subserved by placing him under the control of the person chosen. This being true, the master, after an infant is bound to him as an apprentice, cannot transfer or assign him to another without the consent of the child, or at least the consent of those exercising parental control over him.¹ Of course, if the apprentice voluntarily continues this service under his master with the approval of all parties in interest, he may do so.² If the master dies the apprenticeship is at an end; the apprentice does not have to serve his executor or administrator. The right to such service is generally held to be personal in the master to whom the apprentice is directly bound.³ But the mere bankruptcy of the master does not, of itself, discharge an apprentice, though it may be a ground for so doing or of procuring the discharge; for the change in the fortunes of the master may totally unfit him to discharge his trust faithfully and in accordance with the terms of the apprenticeship.⁴ If the apprentice, being assigned to a new master with consent of all parties, continues to serve in his new relation according to his terms with his old master, he will not be permitted to recover anything from the new master for his services unless he could have done so from the former master under the original agreement of apprenticeship;⁵ though if the master should compel the apprentice to work for him by force or fear, when the apprentice may have refused so to do because of the invalidity of the articles of apprenticeship or for any other reason recognized by law, the apprentice would be entitled to recover the reasonable value of the services which he might render under such circumstances.⁶

§ 837. Apprentice — Right of master to discharge apprentice.— The articles of apprenticeship require certain duties of a mutual nature between the master and the apprentice. Among

¹ Nickerson v. Howard, 19 Johns. 113; King v. Stockland, 1 Doug. 70, 71; Tucker v. Magee, 18 Ala. 99; Randall v. Rotch, 12 Pick. (Mass.) 107; Hall v. Gardner, 1 Mass. 172; Davis v. Coburn, 8 Mass. 299; Stringfield v. Heiskell, 2 Yerg. (Tenn.) 546.

² King v. Stockland, 1 Doug. 70; Rex v. East Bridgeford, 2 Str. 1115;

Williams v. Finch, 2 Barb. 208; Maltby v. Harwood, 12 Barb. 473, 478; Potter v. Greene, 39 Hun, 72.

³ Baxter v. Durfield, 2 Str. 1266.

⁴ Puckington v. Beauchamp, 1 Str. 582.

⁵ Williams v. Finch, 2 Barb. 208; Harvey v. Owen, 4 Blackf. (Ind.) 337.

⁶ Potter v. Greene, 39 Hun, 72.

those required of the master is that of keeping the apprentice for a certain time and giving him the stipulated training for that time. So long as the apprentice keeps his part of the agreement and fully performs his duty, the master must faithfully discharge his. He has, therefore, the apprentice not being materially at fault, no right to arbitrarily or wrongfully refuse to give him proper instruction. And if the master, not complying fully with his part of the contract, discharges his apprentice without just or legal excuse, he will be amenable to the latter for any and all legitimate damages sustained by reason of the dismissal.¹ No doubt the master would not have a right to discharge his apprentice, though the latter might be at fault, if such fault is superinduced or caused by the wrong of the master.² And a contract of apprenticeship is not violated by an infant apprentice by his marriage, though by statute such a marriage operates, *ipso facto*, to dissolve the relation of master and apprentice.³ A master may, of course, dismiss his apprentice for gross misconduct. And in such cases there is no liability on the part of the master to the apprentice by reason of the dismissal for the value of any services rendered up to the time thereof. Any instruction which the apprentice may have received up to that time must serve as a full and complete compensation for his partial performance of his duties as apprentice. At least the apprentice will not be entitled to any pay where he has brought about his discharge by his own improper conduct.⁴ In the nature of things, however, fault will not be so readily imputed to the apprentice as to the master. The master is supposed to be a mature person, and should be. The apprentice is young and necessarily immature and indiscreet according to his age and understanding. Slight misconduct on his part should not be charged seriously against him. Misconduct of the same degree would not be as reprehensible or culpable in the apprentice as in the master.

§ 838. Right to recover for services of child — Seduction.

At common law, being entitled to the custody and services of

¹ *Maw v. Jones*, 25 Q. B. Div. 107; ³ *King v. Snedeker*, 137 Ind. 503, 37
Darling v. Vulcan Iron Works, 26 N. E. Rep. 396.

Oreg. 405, 38 Pac. Rep. 342.

⁴ *Learoyd v. Brook* (1891), 1 Q. B.

² See *Darling v. Vulcan Iron Works*, 431.
26 Oreg. 405, 38 Pac. Rep. 342.

his infant child, the father has the right to recover from a stranger who wrongfully deprives him thereof in any way. So when one seduces the daughter, the law gives the father a right of action against the wrong-doer for the loss of services and the incident lying-in expenses.¹ And this right of the father to recover for such services does not depend upon the infant being actually in his household; but the action may be maintained, though the daughter be employed in the household or service of another, so long as the parental control is not relinquished past recall.² And although the father may have fully relinquished control over his daughter, yet he may revoke this relinquishment at pleasure and afterwards sue for her seduction.³ And such right of action on the part of the parent is entirely separate from the right to recover for the same injury by the person seduced.⁴ Where the child at the time of her seduction is living permanently away from her father with his consent, it has been held that there is no right of action in the father for the seduction.⁵ If the father be dead, the mother, then having the right to the services of her daughter, may sue for the seduction.⁶ And this is true though the se-

¹ *Simpson v. Grayson*, 54 Ark. 404, 16 S. W. Rep. 4; *Gilley v. Gilley*, 79 Me. 292, 9 Atl. Rep. 623; *Patterson v. Thompson*, 24 Ark. 55.

² *Martin v. Payne*, 9 Johns. 387; *Hornketh v. Barr*, 8 S. & R. (Pa.) 36; *Simpson v. Grayson*, 54 Ark. 404, 16 S. W. Rep. 4; *Clark v. Fitch*, 2 Wend. 459; *Bartley v. Richtmyer*, 2 Barb. 188. affirmed in 4 N. Y. 38; *Kennedy v. Shea*, 110 Mass. 147; *Ball v. Bruce*, 21 Ill. 161; *Davidson v. Goodall*, 18 N. H. 423; *Maguinay v. Saudek*, 5 Sneed (Tenn.), 146; *Vanhorn v. Freeman*, 1 Halst. (N. J. L.) 322; *Mulvehall v. Millward*, 11 N. Y. 343; *Patterson v. Thompson*, 24 Ark. 55; *Emery v. Gowen*, 4 Greenl. (Me.) 33; *Lawyer v. Fritcher*, 130 N. Y. 239, 29 N. E. Rep. 267; *Lawyer v. Fritcher*, 54 Hun, 586; *White v. Murtland*, 71 Ill. 250.

³ *Clark v. Fitch*, 2 Wend. 459; *Martin v. Payne*, 9 Johns. 387.

⁴ *Simpson v. Grayson*, 54 Ark. 404, 16 S. W. Rep. 4.

⁵ *Dean v. Peel*, 5 East, 45. In this

case the daughter was seduced while living in another family as a household servant, having no intention of returning to her father, though after the seduction she actually did return to and was maintained and supported by him. The case stands alone and has received severe and, it is believed, just and proper criticism in this country. *Martin v. Payne*, 9 Johns. 387; *Emery v. Gowen*, 4 Greenl. (Me.) 33, 39; *Sargent v. ———*, 5 Cowen, 106, 115. But see, however, *Hornketh v. Barr*, 8 S. & R. (Pa.) 36; *Gray v. Duvland*, 51 N. Y. 424, 428; *Mulvehall v. Millward*, 11 N. Y. 343; *Parker v. Meek*, 3 Sneed (Tenn.), 29, 34, though the author has found but the single English case denying the right of recovery.

⁶ *Sargent v. ———*, 5 Cowen, 106; *Damon v. Moore*, 5 Lans. (N. Y.) 454; *Gray v. Burland*, 51 N. Y. 424; *Parker v. Meek*, 3 Sneed (Tenn.), 29; *Felkner v. Scarlet*, 20 Ind. 154.

duction may have taken place in the life-time of the father, where the loss of service sued for happened after his death.¹ But damages cannot be recovered for the expense of rearing the fruit of the illicit intercourse.²

§ 839. Seduction — Loss of services — Proof of — Necessity for.— It is not necessary in order for a parent to maintain an action for the seduction of his daughter that he prove actual services or loss thereof. It is sufficient that it be shown that the child is the daughter of the person suing and residing in his family as such, or is elsewhere with his consent and approval.³ Even if proof of loss of service be required, evidence of the loss of merely nominal or the slightest service is sufficient.⁴ But neither proof of loss of services nor any other proof can avail the father anything in an action of this kind where he has connived at or sanctioned the intercourse with his daughter.⁵ But it is by no means necessary, in order to ground a recovery, that pregnancy follow the intercourse.⁶ That by the act of seduction a venereal disease is communicated to the child, whereby she is disabled from performing filial services, may be shown in evidence as an element of damages incident to the seduction.⁷ That the defendant has offered to marry the daugh-

¹ *Coon v. Moffett*, 2 Penn. (N. J.) 583; *Parker v. Meek*, 3 Sneed (Tenn.), 29. The contrary rule prevails in Pennsylvania, however. *Logan v. Murray*, 6 S. & R. (Pa.) 175; *South v. Denniston*, 2 Watts (Pa.), 474; *Dunlap v. Linton*, 144 Pa. St. 335, 22 Atl. Rep. 819.

² *Sargent v. —*, 5 Cowen, 106.

³ *Hewit v. Prine*, 21 Wend. 79; *Kennedy v. New York Cent. & H. R. R. Co.*, 35 Hun, 186; *Mulvehall v. Millward*, 11 N. H. 343; *Millar v. Thompson*, 1 Wend. 447; *Clark v. Fitch*, 2 Wend. 459; *Martin v. Payne*, 9 Johns. 387; *Fores v. Wilson*, Peake (N. P.), 55; *Maguinay v. Sandek*, 5 Sneed (Tenn.), 146, 149; *Park v. Meek*, 3 Sneed (Tenn.), 29; *Bartley v. Richtmyer*, 4 N. Y. 38; *Ingersoll v. Jones*, 5 Barb. 661; *Vanhorn v. Freeman*, 1 Halst. (N. J. L.) 322; *Felkner v. Scarlet*, 29 Ind. 154.

⁴ *Knight v. Wilcox*, 15 Barb. 279; *Gray v. Durland*, 51 N. Y. 424; *Lawyer v. Fritcher*, 54 Hun, 586, 588; *Moran v. Dawes*, 4 Cowen, 412; *Kennedy v. Shea*, 110 Mass. 147; *Mercer v. Walmsley*, 5 H. & J. (Md.) 27; *Ball v. Bruce*, 21 Ill. 161; *Davidson v. Goodall*, 18 N. H. 423, 428; *Badgley v. Decker*, 44 Barb. 577; *Martin v. Payne*, 9 Johns. 390.

⁵ *Seager v. Sligerland*, 2 Cal. (N. Y. T. R.) 219; *Travis v. Narger*, 24 Barb. 614, 623; *Akerley v. Haines*, 3 Cal. (N. Y. T. R.) 292. And see *Bunnell v. Greathead*, 49 Barb. 106, 107.

⁶ *White v. Nellis*, 31 N. Y. 405, 410.

⁷ *White v. Nellis*, 31 N. Y. 405, 410. The proper form of action in these instances under the common-law procedure is case. *Moran v. Dawes*, 4 Cowen, 412; *Stiles v. Tilford*, 10 Wend. 339. Though it seems trespass will lie if the act was accomplished after

ter since the wrong was committed is not competent evidence in mitigation of the injury.¹

§ 840. **Seduction — Person seduced need not be natural child.**— In order that a recovery may be had for the seduction of an infant female, it is not always necessary that the action be brought by the natural father or mother, for these may be dead, or may have in some way lost or forfeited their right to the custody and services of their daughter. The rule is, such damages are recoverable by any one who stands *in loco parentis* to the child. So where a person has adopted a girl child, he may recover the same damages which a natural parent could for her seduction.² And an aunt may recover for the seduction of her niece where the girl sustains the relation of *quasi* or adopted child to the aunt.³ A grandfather who takes a child to raise in pursuance of a request by its parents before their death may maintain the action, though at the time of the seduction she was living away from him as the servant of another, and appropriating her earnings to her own use with the consent of her grandfather.⁴ Where an orphan infant having no other home or relations who can support her goes to the home of a cousin and there renders domestic services and receives support in return, the cousin stands to the infant *in loco parentis* to the extent that he may sue for her seduction.⁵ A person may adopt a step-child and receive her into his home as a member of his family and as a child generally. And when this is the case a right of action accrues to him for the seduction of such child.⁶ But in the case of step-children they must be in the actual service of the *quasi*-parent in order that a recovery may be had, for, being merely strangers, they owe no

a breaking of a house for the purpose of seduction. *Ream v. Rank*, 3 S. & R. (Pa.) 215; *Mercer v. Walmsley*, 5 H. & J. (Md.) 27; *Parker v. Meek*, 8 Sneed (Tenn.), 29. Where the action is trespass, the plaintiff may well join seduction in one count and any other facts in aggravation in another. *White v. Murtland*, 71 Ill. 250.

¹ *Ingersoll v. Jones*, 5 Barb. 661.

² *Irwin v. Dearman*, 11 East, 23;

Fores v. Wilson, Peake, N. P. 55; *Ball v. Bruce*, 21 Ill. 161; *Maguinay v. Saudek*, 5 Sneed (Tenn.), 146; *Bartley v. Richtmeyer*, 4 N. Y. 38; *Ingersoll v. Jones*, 5 Barb. 661; *Howland v. Howland*, 114 Mass. 517.

³ *Edmondson v. Machell*, 2 T. R. 4.

⁴ *Cartwell v. Hoyt*, 6 Hun, 375.

⁵ *Davidson v. Goodall*, 18 N. H. 423.

⁶ *Maguinay v. Sandek*, 5 Sneed (Tenn.), 146.

legal duty of service to such parent, and a child thus situated may dissolve the apparent relation of parent and child; and this is effected when the child goes to another and enters upon service for him.¹ That the child is a bastard is no defense where it has been received into the family of the person suing to be raised. Such person stands *in loco parentis* to the child regardless of her legitimacy.² But if the child is away for a time only, having all the while the intention of returning, and is expected to return by the *quasi*-parent, a temporary absence will not defeat the action.³

§ 841. **Seduction — Extent of damages recoverable.**— The ordinary lying-in expenses, together with the value of the services of the daughter of which the parent has been deprived, are always elements of damage in actions of this nature. But this is not all. “The jury are not confined, in their estimate of damages, to the mere amount of damage from loss of service, and the expenses consequent upon the seduction, but may award a compensation for the loss which the father has sustained in being deprived of the comfort and society of his child, the injury he sustains as the parent of other children whose morals may be corrupted by her bad example, and for the dishonor and disgrace cast upon the plaintiff and his family by such an injury.⁴ In actions for seduction it is proper to admit in evidence the pecuniary ability and condition in life of the parties.⁵ This is not for the purpose of fixing a criterion as to the amount of the liability of the defendant, but is permissible as

¹ Bartley v. Richtmeyer, 4 N. Y. 38.

² Bracy v. Kibbe, 31 Barb. 273.

³ Davidson v. Goodall, 18 N. H. 423; Ingersoll v. Jones, 5 Barb. 661; Nickelson v. Stryker, 10 Johns. 115.

⁴ Patterson v. Thompson, 24 Ark. 55, 61; Simpson v. Grayson, 54 Ark. 404, 16 S. W. Rep. 4; Felkner v. Scarlet, 29 Ind. 154; Dain v. Wycoff, 7 N. Y. 191; Stout v. Shepherd, 73 Mich. 588, 41 N. W. Rep. 696; Badgley v. Decker, 44 Barb. 577; Rollins v. Chalmers, 51 Vt. 592, 29 Am. Law Rev. 266, 267, 268; Martin v. Payne, 9 Johns. 387, 390; Irwin v. Dearman, 11 East, 27; Dodd v. Norris, 3 Camp. N. P. 519; Bed-

ford v. M'Kowl, 3 Esp. 119; Damon v. Moore, 5 Lans. 454, 458; Knight v. Wilcox, 15 Barb. 279; Lipe v. Eisenlerd, 32 N. Y. 229; Emery v. Gowen, 4 Greenl. (Me.) 33; Ball v. Bruce, 21 Ill. 161; Parker v. Meek, 3 Sneed (Tenn.), 29; Comer v. Taylor, 82 Mo. 346, 349; Morgan v. Ross, 74 Mo. 318, 323; Grable v. Margrave, 3 Scam. (Ill.) 372; Bartley v. Richtey, 4 N. Y. 38, 44, 45; Ingersoll v. Jones, 5 Barb. 661; Mighell v. Stone (Ill.), 51 N. E. Rep. 906.

⁵ Grable v. Margrave, 3 Scam. (Ill.) 372.

tending to prove probable aggravation and mortification.¹ That the defendant produced or attempted an abortion on the daughter may be shown to enhance the damages.² And the fact that the defendant may be criminally liable for such an act cannot be shown in mitigation.³ The arts and inducements used to accomplish the intercourse may be proven.⁴ Nor is the fact that the seduced child may have been immoral a complete bar to an action by the parent for the injury. It is only admissible in mitigation of the damages otherwise recoverable.⁵ Evidence of immorality on the part of the daughter, however, must be confined to acts preceding the seduction.⁶ And in any event the remedy is given only to those who stand *in loco parentis*. So a step-father cannot maintain an action for the seduction of a daughter of his wife by another husband, unless he has received such child into his family, realized her domestic services, and given her support, maintenance and treatment as a member of his family.⁷ This is true because, unless such child has been so received into the family, the step-father is practically a stranger to her, has no right to her services, owes her no duty of support, and has no right in law to control her in any way.

§ 842. **Services — Presumptions.**— Where a child is living in the family of its parents as children usually do, there is a legal presumption that the infant yields the parents some service in return for support received, and direct proof of such service is not necessary.⁸ But while this presumption takes the

¹ White v. Murtland, 71 Ill. 250.

² White v. Murtland, 71 Ill. 250; Klopfer v. Bromme, 26 Wis. 372.

³ Klopfer v. Bromme, 26 Wis. 372; Hendrickson v. Kingsbury, 21 Iowa, 379.

⁴ Klopfer v. Bromme, 26 Wis. 372; Bracy v. Kibbe, 31 Barb. 273.

⁵ Verry v. Watkins, 7 Car. & P. 308; Akerly v. Haines, 2 Cal. (N. Y. T. R.) 292; Stout v. Shepherd, 73 Mich. 588, 41 N. W. Rep. 696; Bracy v. Kibbe, 31 Barb. 273; Simpson v. Grayson, 54 Ark. 404, 408, 16 S. W. Rep. 4. See also Hill v. Wilson, 3 Blackf. (Ind.) 123; Comer v. Taylor, 82 Mo.

346; White v. Murtland, 71 Ill. 250.

In Missouri, however, it is denied that the immorality of the daughter is competent evidence to be shown even in mitigation of damages. McKern v. Calvert, 59 Mo. 243; Morgan v. Ross, 74 Mo. 318, 329. And see to practically the same effect, Dain v. Wycoff, 7 N. Y. 191; Milliken v. Long (Pa.), 41 Atl. Rep. 540.

⁶ White v. Murtland, 71 Ill. 250; McKern v. Calvert, 59 Mo. 243.

⁷ Bartley v. Richtmyer, 4 N. Y. 38.

⁸ Parker v. Meek, 3 Sneed (Tenn.), 29; Conger v. Van Aernum, 43 Barb. 602; Wilcox v. Wilcox, 48 Barb. 327;

place of proof and renders it unnecessary, yet the presumption itself may be overcome by proof of facts showing a different relation between the parent and child.¹ Where an infant of tender years is taken into the family of his uncle and cared for, and the child renders domestic services to the uncle until arriving at full age, but afterwards pays his own expenses and furnishes his own support, there is no presumption of services after becoming of age, or rather the presumption is overcome.² It is always necessary, in order that this presumption may be overcome, to show some express agreement between the parties that the services which the daughter renders are to be paid for, or a state of facts from which an intention to pay and receive compensation will necessarily be implied.³ The rule is the same where the child, after attaining majority, remains with and continues to serve the parent as before.⁴ But when a claim is made for such services, the *onus* will be on the party asserting it; and if the facts proven be sufficient, the issue as to whether there was an express or implied mutual agreement that the services should be paid for will be one of fact under proper instructions.⁵ Where a son has a family of his own, lives apart from his parents, has reached his majority, and performs labor such as hired hands ordinarily perform, at the request of his father, there is no presumption that such services are gratuitous, but rather that both parties expected compensation to be made to the extent of the reasonable value of the work.⁶ Of course the same principle would apply in case the child were a daughter.

§ 843. Seduction — Victim must usually be an infant.—

As the theory of the ground of this action, in fiction at least, is the loss of supposed or actual services, it follows that, ordinarily, the action cannot be maintained unless, at the time of the seduction or some time subsequent thereto, the relation of

Patterson v. Collar, 31 Ill. App. 340, 347; Mowbry v. Mowbry, 64 Ill. 383; Meyer v. Temme, 72 Ill. 574; Dunlap v. Allen, 90 Ill. 108; Miller v. Miller, 16 Ill. 296; Morton v. Rainey, 82 Ill. 215; Davis v. Goodenow, 27 Vt. 15.

¹ Parker v. Meek, 3 Sneed (Tenn.), 29.

² Morton v. Rainey, 82 Ill. 215.

³ Dunlap v. Allen, 90 Ill. 108; Miller v. Miller, 16 Ill. 296.

⁴ Miller v. Miller, 16 Ill. 296; Cooper v. Cooper, 12 Ill. App. 478; Morton v. Rainey, 82 Ill. 215; Guenther v. Birkicht, 22 Mo. 439; Hart v. Hart, 41 Mo. 441, 445.

⁵ Smith v. Myers, 19 Mo. 433; Hart v. Hart, 41 Mo. 441, 446.

⁶ Steel v. Steel, 12 Pa. St. 64.

master and servant existed between the party complaining and the injured child. So, as a female person, upon arriving at the age of twenty-one years, or other age fixed by statute at which infancy ceases, is no longer under legal obligations to render to her parent or other person domestic services, it follows that an action for seduction will not lie if the seduction took place after the child attained her majority.¹ The fact that the grown child may be in the employment of another under a contract whereby her father is to receive part of the wages for her services renders the rule different.² And the same rule obtains where the child has attained her majority and lives away from her father, though she may visit him frequently.³ But though the child may have arrived at twenty-one years, and nevertheless still remains with her parents performing domestic services as before, the action may be maintained.⁴ The damages recoverable are the same whether the infant has arrived at full age or not.⁵ And the fact that the daughter, upon attaining her majority, may at any time renounce the authority of her parent makes no difference so long as she remains and renders domestic service.⁶ Nor is it necessary that there be a contract for service between the parent and child.⁷ And the fact that the act of intercourse was accomplished by force will be no defense to the action.⁸

¹ Harper v. Luffkin, 7 Barn. & Cr. 387; Millar v. Thompson, 1 Wend. 447; Mercer v. Walmsley, 5 H. & J. (Md.) 27; Ball v. Bruce, 21 Ill. 161, 162; Nickleson v. Stryker, 10 Johns. 115; McDaniel v. Edwards, 7 Ired. (N. C.) 408; Phipps v. Garland, 3 Dev. & Bat. (N. C. Law), 44.

² McDaniel v. Edwards, 7 Ired. (N. C.) 408.

³ Phipps v. Garland, 3 Dev. & Bat. (N. C. Law), 44.

⁴ Nickleson v. Stryker, 10 Johns. 115; Millar v. Thompson, 1 Wend. 447; Patterson v. Thompson, 24 Ark. 55; Lipe v. Eisenlerd, 32 N. Y. 229;

Mercer v. Walmsley, 5 H. & J. (Md.) 27; Conger v. Van Aernum, 43 Barb. 602; Wilheit v. Hancock, 5 Bush (Ky.), 567; Badgley v. Decker, 44 Barb. 577.

⁵ Lipe v. Eisenlerd, 32 N. Y. 229; Ingersoll v. Jones, 5 Barb. 661; Irwin v. Dearman, 11 East, 23.

⁶ Lipe v. Eisenlerd, 32 N. Y. 229; Bennett v. Allcott, 2 T. R. 166.

⁷ Bennett v. Allcott, 2 T. R. 166.

⁸ Kennedy v. Shea, 110 Mass. 147; Furman v. Applegate, 23 N. J. L. 28; Damon v. Moore, 5 Lans. 454, overruling Hogan v. Cregan, 6 Rob. (N. Y. Sup. Ct.) 138.

CHAPTER XI.

GUARDIAN AND WARD. -

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§ 844. **Definition of guardian.**—Generally, a guardian is one who has by law the care, custody, control or management of either the person or estate of his ward. Under the law of guardian and ward as at present generally in force and administered in this country, there are only two kinds of guardians, to wit: Guardian of the person, who stands *in loco parentis* to the ward in a more intimate degree than any other kind of guardian, perhaps, having the duty of rearing, caring for, maintaining, and, as far as the estate of the ward will permit, of supporting the ward as a natural parent is required by law to do. The other kind of guardianship is that of the estate of the ward, aside from the care of the person. Such a guardian is frequently termed a curator of the estate, for he has nothing to do with the person of the ward and no control over him in this respect. His duties are to properly manage the estate and pay it over under the directions of the court, to which, by law, he is made answerable and from which he receives his authority to act. Aside from these kinds of guardianship there is the natural guardian. The suggestion of this name will imply the nature of the guardianship. It is the parental guardianship. The father, during his life, is the natural guardian of all of his infant children, being preferred in the law to the mother.¹ When he dies, however, the mother instantly becomes the natural guardian, without any act on her part or that of the infant children. She then has the same rights of guardian by nature

¹ Bowles v. Dixon, 32 Ark. 92; v. Kendall, 4 Minn. 412; Taylor v. Combs v. Jackson, 2 Wend. 153; McJeter, 33 Ga. 195; King and Queen Neil v. First Congregational Soc., 66 Cal. 105, 4 Pac. Rep. 1096; Townsend v. Thorp, 5 Mod. 221.

which the father had in his life-time. But the father is the natural guardian of his legitimate children only. The mother is the natural guardian of her bastard child in preference to the father or others.¹ Again, there is the guardian in socage of the common law. To this guardian was given the care and control of the lands of the infant as well as the custody of his person. It bears a resemblance to the species of guardianship usually in force under American statutes authorizing a guardian of both the person and estate of the ward. "The common law gave this guardianship to the next of blood to the child to whom the inheritance could not possibly descend; and therefore, if the land descended to the heir on the part of the father, the mother, or other next relation on the part of the mother, had the guardianship; and so if the land descended to the heir on the part of the mother, the father or his next of blood was preferred."² The guardianship in socage was only allowable under the common law when the ward was entitled to some estate in realty;³ and not then unless it was acquired by descent. There was no guardianship in socage when the realty was acquired by purchase.⁴ By the common law the authority of a guardian in socage ceases when the ward arrived at the age of fourteen years, for he was then entitled to choose his own guardian and thereby oust the guardian in socage.⁵ At this age the ward was supposed to have discretion sufficient to enable him to choose his own guardian. The statutes of the various states usually allow an infant of this age to nominate his guardian, subject to more or less cautionary restrictions. There are what is known to the common law as testamentary guardians. These are such as the parent might name by will in a prescribed form, and the authority thus conferred upon such a guardian lasted until the infant became twenty-one years of age.⁶ This power to appoint a testamentary guardian is frequently given by statute in this country with

¹ *People v. Kling*, 6 Barb. 366; *Wright v. Wright*, 2 Mass. 109; *Somers v. Dighton*, 12 Mass. 383; *Ramsay v. Thompson*, 71 Md. 315, 18 Atl. Rep. 592.

² *Quadrang v. Downs*, 2 Mod. 176; 2 Kent, Comm. 222; 1 Bl. Comm. 461; *Combs v. Jackson*, 2 Wend. 153.

³ 1 Bl. Comm. 461.

⁴ *Combs v. Jackson*, 2 Wend. 153.

⁵ 2 Kent, Comm. 222; 1 Bl. Comm. 462.

⁶ 1 Bl. Comm. 462; 2 Kent, Comm. 225.

more or less modification of the English law, though with marked general similarity. A guardianship by nurture is the right of the parent to the custody and control of his child until he arrives at fourteen, and is analogous to that by nature. When the child, whether male or female, arrives at the age of fourteen years, this species of guardianship ceases.¹ A guardian by nurture has no right of control over the estate of his ward.² Having no authority to manage, control or possess it, it very naturally follows that he has no right to sue for it or for any damages or other right of action concerning it.³

§ 845. Who entitled to guardianship.—As a rule, all infants are entitled to guardianship. This is true whether the infant be a bastard or legitimate.⁴ This is because the law presumes them incompetent to look after their own interests with sufficient intelligence to avoid imposition or like injury. The protection of guardianship is also given to those who, being *non compos mentis*, are not for this reason capable of managing their affairs.⁵ Indeed, if there should be any preference as to the right of guardianship, it would sometimes exist in favor of the insane person, for an infant may have arrived at such years of discretion as to be practically able to take reasonable care of himself and his estate. The underlying principle is necessity, and guardianship is sometimes extended by statute to those who are not only *sui juris*, but are, moreover, *compos mentis* as well; that is, they are not so deranged in mind as to be irresponsible. These are usually spendthrifts, who, having acquired a reckless habit of extravagance and an uncontrollable desire to spend their substance, actually need the interposition of a legal guardian to take charge of and manage their property, to the end that it be not wasted and the spendthrift be assured the fullest enjoyment and benefit thereof. Again, an infant will be entitled to a guardian whenever he

¹ 2 Kent, Comm. 221.

² Kinney v. Harrett, 46 Mich. 87, 8 N. W. Rep. 708; Haynie v. Hall's Ex'rs, 5 Humph. (Tenn.) 290; Rhea v. Bagley, 63 Ark. 374, 38 S. W. Rep. 1039.

³ Magrunder v. Peter, 4 Gill & J. (Md.) 323; Kinney v. Harrett, 45

Mich. 87, 8 N. W. Rep. 708; Ross v. Cobb, 9 Yerg. (Tenn.) 463.

⁴ Potes' Appeal, 106 Pa. St. 574.

⁵ Muse v. Muse (Miss.), 24 S. Rep. 168; Kimball v. Fisk, 39 N. H. 110; Anderson v. Estate of Anderson, 42 Vt. 350.

has any property which should be administered, though he may have parents. His natural guardian has no authority or dominion over his property, and he is entitled to have a legal representative, who will be required by law to properly manage and account for it.¹ And the fact that the infant may marry before attaining majority will not dissolve the relation of guardian and ward.²

§ 846. **Insane persons are usually entitled to guardianship.**—Persons *non compos mentis* are considered not capable of properly caring for their estate or person. Idiots, lunatics and insane persons, therefore, are always considered entitled to a guardian.³ Of course, as a general rule, a court should not appoint a guardian of an insane person until the fact of insanity is properly established. The method of ascertaining this will usually be found in the statutes of the different states, which differ more or less in requirements, and which should be consulted and followed in proceedings of this kind.⁴ An appointment of a person as guardian of a lunatic who is really *compos mentis* is not warranted; and if such an appointment should be procured by fraud, deceit, or otherwise, it will be set aside upon proper proceedings for the purpose.⁵

§ 847. **Appointment of guardian — Discretion of court.**—As a rule, the appointment of a guardian rests in the sound discretion of the court having jurisdiction in such matters. And an appointment made by such court will always be upheld where no abuse of discretion is shown and the person appointed is not forbidden to hold the office or trust by positive law.⁶ This is true though the appointment is made to supply a vacancy caused by the removal of a preceding guardian, where it does not appear that the discretion or authority of the court was abused in removing the first.⁷ The chief inquiry in all

¹ *Fridge v. State*, 3 Gill & J. (Md.) 103.

² *State v. Joest*, 46 Ind. 235.

³ *Craft v. Simon* (Ala.), 24 S. Rep. 880; *Norton v. Sherman*, 58 Mich. 549, 25 N. W. Rep. 510. And see *McAllister v. Lancaster Co. Bank*, 15 Neb. 295, 18 N. W. Rep. 57.

⁴ See *Craft v. Simon* (Ala.), 24 S. Rep. 880.

⁵ *North v. Washtenaw*, 59 Mich. 624, 26 N. W. Rep. 810; *Kimball v. Fisk*, 39 N. H. 110.

⁶ *Goss v. Stone*, 63 Mich. 319, 29 N. W. Rep. 735; *Nelson v. Green*, 22 Ark. 367; *Fleming v. Johnson*, 26 Ark. 421; *In re O'Connell*, 102 Iowa, 355, 71 N. W. Rep. 211; *In re Van Dewater*, 115 N. Y. 669, 22 N. E. Rep. 174.

⁷ *Sadler v. Rose*, 18 Ark. 600.

cases is as to the jurisdiction. If the court proceeds within its jurisdiction, its action in making the appointment of a guardian will not be vulnerable to collateral attack.¹ No set form of words is necessary. If it is clear from the words used that the court intended the appointment, this will be sufficient.² Generally there can be only one guardian at a time; and the appointment of a guardian before the office of a former guardian becomes vacant by death, resignation, removal or otherwise is invalid.³

§ 848. **Must be a valid order of appointment.**—The appointment of a guardian must take its validity from an order of a court having jurisdiction of the subject-matter. If the order be void for want of jurisdiction either of the person or subject-matter, it can have no force and may be assailed by a collateral attack.⁴ And as a rule, no court except that having jurisdiction to make the appointment can confer any authority upon a person to act as guardian. This being true, a county court cannot appoint a guardian or grant letters of guardianship when the authority to do so is lodged in a court of probate. And this is true though both courts be presided over by the same judge.⁵ And where the statute provides that the probate court in the county where the ward and his property are may appoint a guardian, a probate court of a county in which there is no property of the ward and in which he has no domicile or residence is of no force.⁶ The appointment should be made by the court of the county where the *bona fide* domicile of the ward is, no matter where he may be temporarily or at the time of the appointment.⁷ But there must be some means of ascertaining whether any court has the necessary jurisdiction to make the appointment. This authority is lodged in the courts themselves, and the court in which the proceeding is

¹ Craft v. Simon (Ala.), 24 S. Rep. 380; Kelley v. Morrell, 29 Fed. Rep. 736; Hodgson v. Southern Pac. R. R. Co., 75 Cal. 642, 17 Pac. Rep. 928.

² Ingram v. Larowssini, 50 La. Ann. 69, 23 S. Rep. 498.

³ Thomas v. Burrus, 23 Miss. 550.

⁴ Mosby v. Gisborn (Utah), 54 Pac. Rep. 121; Boyd v. Glass, 34 Ga. 253; Earl v. Dresser, 30 Ind. 11.

⁵ Heilman v. Martin, 2 Ark. 158.

⁶ Nettelon v. Mosier, 3 Fed. Rep. 387; Norton v. Miller, 25 Ark. 108. See also Dampier v. McCall, 78 Ga. 607, 3 S. E. Rep. 563; In re Guardianship of Dameker, 67 Cal. 643, 8 Pac. Rep. 514.

⁷ Jenkins v. Clark, 71 Iowa, 552, 32 N. W. Rep. 504; Kelsey v. Green, 69 Conn. 291, 37 Atl. Rep. 679.

pending may inquire into its jurisdiction; and its finding, in the absence of an affirmative showing to the contrary, will be presumed authorized by the necessary facts, upon the principle that superior courts of record are presumed to act regularly.¹

§ 849. Appointment of guardian in vacation.—As the courts are not always in session, and as it may be necessary at any time to have a guardian appointed, it is usually provided by statute that the clerks of courts having jurisdiction over the persons and estates of infants may appoint a guardian in vacation, who will hold his office and be empowered generally as guardian, subject to the approval and confirmation of the court in term time. In applying for letters of guardianship in vacation, the person petitioning is generally required to give bond and comply with other formalities, the same as though the application for appointment were made to the court instead of to the clerk in vacation.² Of course it is necessary that the letters of guardianship be approved or confirmed by the proper court in term time, and this should usually be at the first term succeeding the appointment in vacation. But it is not always necessary that the court make an order expressly confirming the appointment. So where a guardian who has received his appointment in vacation renders his accounts to the court, and is by the court recognized in its orders as guardian, the regularity of the appointment cannot be attacked in a collateral proceeding.³

§ 850. Letters of guardianship — Service by publication. Where the law requires as a condition precedent to a valid order granting letters of guardianship that all parties in interest be brought into court by publication, such publication and notice take the place of personal service, and all the requirements of the law with reference to this manner of bringing parties in interest into court must be strictly pursued and faithfully followed, otherwise jurisdiction of the person will not be obtained.⁴

¹ Lessee of Grignon, 2 How. (U. S.) 319; Kelley v. Morrell, 10 Fed. Rep. 736.

² Knott v. Clements, 13 Ark. 335; Shumard v. Phillips, 53 Ark. 37, 42, 13 S. W. Rep. 510.

³ Shumard v. Phillips, 53 Ark. 37, 13 S. W. Rep. 510.

⁴ Mosby v. Gisborn (Utah), 54 Pac. Rep. 121, 127; Galpin v. Page, 18 Wall. 350; Chase v. Hathaway, 14 Mass. 222; Park v. Higbee, 6 Utah, 414, 24

Of course the provision for the service of summons by publication usually applies only to those who are non-residents of the state where the proceedings are pending; and the fact that the rights of parties thus residing at a remote distance from the place of jurisdiction are to be precluded by such judicial proceedings affords ample reason for the rigidity of the law in requiring strict compliance with the statutes authorizing judgments upon such constructive service.¹ In other words, the facts conferring jurisdiction must be made to affirmatively appear; and if they do not, the proceedings may be questioned collaterally.²

§ 851. Married woman cannot be guardian.—As a rule the law forbids a married woman to act as guardian of an infant. This is especially the rule at common law, by which the disability of coverture precluded married women from holding such a trust or relation. She could not, in any case, be guardian without the consent of her husband, though she could do so when he consented.³ And when a married woman assumes to act in the capacity of a guardian, the consent of her husband will be presumed unless the contrary be made to appear.⁴ But it seems that the acts of a married woman as guardian are not absolutely void, but voidable only, especially where she has been appointed before marriage and afterwards continues in such capacity with the sanction and approval of her husband.⁵ Such acts of a married woman would be held the acts of a guardian *de facto*, and will generally be recognized as binding until set aside by a proper proceeding for the purpose.⁶ So a sale of land by a married woman as guardian is not absolutely void; and, if confirmed by the court, the confirmation could only be annulled in a direct proceeding. It would not be vulnerable

Pac. Rep. 524; McMinn v. Whelan, 27 Cal. 300. And see Gibney v. Crawford, 51 Ark. 34, 9 S. W. Rep. 309; Ricketson v. Richardson, 26 Cal. 152; Forbes v. Hyde, 31 Cal. 342; Bardsley v. Hines, 33 Iowa, 157; Hathaway v. Clark, 5 Pick. (Mass.) 490.

¹ Galpin v. Page, 18 Wall. 350.

² Lusk v. Perkins, 48 Ark. 238, 2 S. W. Rep. 847; Thatcher v. Powell, 6 Wheat. 119; Gibney v. Crawford, 51 Ark. 34, 9 S. W. Rep. 309; Forbes v. Hyde, 31 Cal. 342.

³ Palmer v. Oakley, 2 Doug. (Mich.) 433; Alexander v. Hardin, 54 Ark. 480, 16 S. W. Rep. 264. And see Decker v. Fessler, 146 Ind. 16, 44 N. E. Rep. 657.

⁴ Palmer v. Oakley, 2 Doug. (Mich.) 433.

⁵ Allen v. McCullough, 2 Heisk. (Tenn.) 174, 194; Palmer v. Oakley, 2 Doug. (Mich.) 433.

⁶ Palmer v. Oakley, 2 Doug. (Mich.) 433; Alexander v. Hardin, 54 Ark. 480, 16 S. W. Rep. 264.

to collateral attack,¹ and it is not necessary that the husband join in a deed by his wife as guardian; for in making a sale of the property of her ward she acts in the capacity of a trustee or officer of the court rather than that of a married woman.² A married woman may act as guardian in Michigan, though this is contrary to the generally accepted doctrine.³

§ 852. Married woman as guardian — Statutory changes in the common law.— While a married woman could not ordinarily act as a guardian at common law, yet, where she is expressly enabled so to do by statute, she may be a guardian as effectively and legally as any other person. Statutes in some of the states will be found authorizing a *feme covert* to become a guardian, and these bestow upon her all the privileges, duties and liabilities that are imposed upon guardians generally.⁴

§ 853. Guardian dealing with property of ward — Effect. However fair the transaction may be, however honest may be the intentions of the guardian, the law positively forbids that one occupying a relation of trust and confidence profit by any act which might redound to the injury of the one to whom the trustee owes a duty. The rule does not go upon the theory that the guardian in purchasing property at a sale by himself, as such, or in otherwise dealing with the funds or property of his ward, does or will do an act to the prejudice of the ward or any of his property rights; but he is forbidden to do thus because it might be to the disadvantage of the ward. It is a species of dealing the tendency of which is necessarily vicious. The frailties of human nature apply to all persons in a more or less extended sense. It might be that the rights of others would be jeopardized or prejudiced by a man of the most honest convictions as well as intentions and purposes. A judge who is related in a near degree to litigants may be able to do complete justice between the parties and may not. He may do one or the other an injustice while believing and intending to do impartial justice in its strictest sense. Either his preference

¹ *Alexander v. Hardin*, 54 Ark. 480, 16 S. W. Rep. 264.

² *Palmer v. Oakley*, 2 Doug. (Mich.) 433.

³ *Goss v. Stone*, 68 Mich. 319, 29 N. W. Rep. 735.

⁴ See *Byrom v. Gunn* (Ga.), 31 S. E. Rep. 560.

for his relative, or his fear that he will do the party opposing his kinsman an injustice, may warp his judgment the one way or the other, however unconsciously it may be. And in either event an injustice will be done. The same is true of a guardian or any person occupying a fiduciary relation, and the same reason of the law forbids that the guardian place himself in an attitude where he might profit to the disadvantage of his ward. For these and other reasons the law positively forbids any transaction by a guardian which might redound to the profit of the guardian or an injury to the ward in his person or estate. This rule rests upon public policy and is well settled.¹ And it applies not only to guardians proper, but to those who stand to the party interested in the relation of guardian or parent,² or who improperly or unlawfully assume to so act.³ Such a transaction is a fraud *per se*, and the courts will always set the same aside without proof of actual fraud.⁴ But where the ward has attained full age, he may, when there is no undue advantage taken by the guardian, ratify any act which was not strictly within the law. So, where a guardian has sold the realty of his ward improperly, it was held that the adult child might elect to ratify the sale and require payment from the guardian of the purchase-money.⁵ But the general rule is, when a guardian asserts a right in conflict with the interest of his ward by reason of any transaction during the guardianship, the burden will be on him to show a state of facts which will sustain his contention, as all presumptions of fact are resolved in favor of the ward when the guardian can only

¹ Waller v. Armistead's Adm'rs, 2 Leigh (Va.), 11; Culberhouse v. Shirey, 42 Ark. 25; Lenox v. Notrebe, Hemp. 225; In re Jones' Estate, 179 Pa. St. 36, 36 Atl. Rep. 175; Hanna v. Spotts' Heirs, 5 B. Mon. (Ky.) 362; Webb v. Branner (Kan.), 52 Pac. Rep. 429; Dohms v. Mann, 76 Iowa, 723, 39 N. W. Rep. 823; Aronstein v. Irvine, 49 La. Ann. 1478, 22 S. Rep. 405; Pennington v. Smith, 78 Fed. Rep. 399, 24 C. C. A. 145; Chorpenning's Appeal, 32 Pa. St. 315; Long v. Mulford, 17 Ohio St. 484. And see, as sustaining the rule by analogy, Wallace v. Wormley, 8 Wheat. 421; Wright v.

Walker, 30 Ark. 44; Imboden v. Hunter, 23 Ark. 522; West v. Waddill, 33 Ark. 575; Mock v. Pleasants, 34 Ark. 63.

² White v. Ward, 26 Ark. 445; Thomas v. Syper, 61 Ark. 575, 33 S. W. Rep. 1059; Hindman v. O'Connor, 54 Ark. 627, 16 S. W. Rep. 1052; Ashton v. Thompson, 32 Minn. 25, 18 N. W. Rep. 918.

³ Thornton v. Gilman (N. H.), 39 Atl. Rep. 900.

⁴ Mock v. Pleasants, 34 Ark. 63.

⁵ Schur's Appeal (Pa.), 2 Atl. Rep. 336; Tomlinson v. Simpson, 33 Minn. 443, 23 N. W. Rep. 864.

prevail by reason of an act which conflicts with his duty to his ward and himself.¹

§ 854. Gift from ward to guardian.—The law does not permit a guardian to accept a gift from his ward. It is against public policy, not so much because it is fraudulent *per se*, for it may be in good faith and free from any improper influence, but because it may be fraudulent. The sway of the guardian might exercise an influence unconsciously. But whether it does or not, transactions of this kind are frowned upon by the law, and especially in courts of equity.² This is not even permitted when the ward has attained full age, if the circumstances are such as to make it probable that the guardian still exerts an influence over the child.³ And as a rule, a gift from a ward to his guardian would be regarded with greater suspicion than a gift from a child to a parent.

§ 855. Right of guardian to sue for ward.—As the ward, being an infant, cannot ordinarily sue in his own name, it is generally held that the guardian in his official capacity and in right of his ward is the proper representative to bring an action for him.⁴ This rule is applied to cases where the realty of the ward is wrongfully detained from him or from his guardian in his representative capacity.⁵ Likewise to enforce a right of action for a wrong to the personal property of the ward,⁶ or for a trespass to the realty.⁷ In Illinois, however, under statute, it is held that the action should be brought by the guardian in the name of the ward.⁸ But this applies only to rights concerning personal property. The guardian therefore cannot

¹ *Hoghton v. Hoghton*, 15 Beav. 278, 299; *Gibson v. Jeyes*, 6 Ves. 266.

² *Hylton v. Hylton*, 2 Ves. Sr. 547; *Williams v. Powell*, 1 Ired. (N. C. Eq.) 460; *Chambers v. Crabbe*, 34 Beav. 457; *Todd v. Grove*, 33 Md. 188; *Hatch v. Hatch*, 9 Ves. 292.

³ *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. Rep. 918.

⁴ *Huntsman v. Fish*, 36 Minn. 148, 30 N. W. Rep. 455; *Norton v. Ohrns*, 67 Mich. 612, 35 N. W. Rep. 175; *Cleveland, C., C. & St. L. Ry. Co. v. Moneyhun*, 146 Ind. 147, 44 N. E. Rep. 1106; *Fox v. Minor*, 32 Cal. 111.

⁵ *Duck Island Club v. Bexstead*, 174 Ill. 435, 51 N. E. Rep. 831; *Hutton v. Williams*, 35 Ala. 503.

⁶ *Fiqua v. Hunt*, 1 Ala. 197; *Independent Order Mut. Aid v. Stahl*, 64 Ill. App. 314; *Truss v. Old*, 6 Rand. (Va.) 556.

⁷ *Palmer v. Oakley*, 2 Doug. (Mich.) 433.

⁸ *Muller v. Benner*, 69 Ill. 108; *Duck Island Club v. Bexstead*, 174 Ill. 435, 51 N. E. Rep. 831; *Fox v. Minor*, 32 Cal. 111.

bring ejectment to recover land of his ward in his own name.¹ The guardian as an individual has no right to the possession of the property of his ward. In order to sue, therefore, a guardian must show his appointment and authority to act for the ward.² The guardian, however, may sue in his own name on a note executed to him individually for funds or property belonging to the ward.³ And while the guardian may sue in behalf of his ward, he will have no right to sue the latter so long as the relation of guardian and ward is in existence.

§ 856. Right of guardian to sue in ejectment to recover lands of his ward.— By virtue of his legal authority the guardian or curator of an estate of an infant is clothed with the right of possession of this estate whether it be real or personal.⁴ It has been held that he even has a kind of interest in the estate, though not a beneficial interest.⁵ Ejectment being a possessory action akin to the action of replevin, where personal property is involved, it must be brought by the person having the right to possession. And as this right to the estate of an infant is vested by law in the guardian or curator of the estate, it necessarily follows that the guardian, acting in his representative capacity, is the proper person to bring the action.⁶ This right of possession in the guardian is superior to the right of the ward to occupy his lands. And if he should, by any means, get possession and hold it in defiance of the right or authority of the guardian, the latter may oust the ward by ejectment, just as though a stranger were asserting the right of possession instead of the ward.⁷ At common law the guardian in socage might bring ejectment for any lands to the possession of which, by reason of his guardianship, he was entitled.⁸

§ 857. Guardianship — Proof of.— As a guardian is appointed by a court authorized by law to make the appointment, it would necessarily follow from the elementary principles of

¹ *Muller v. Benner*, 69 Ill. 108; *Kinney v. Harret*, 46 Mich. 87, 8 N. W. Rep. 708.

² *Hutchins v. Johnson*, 12 Conn. 376.

³ *McLean v. Dean*, 66 Minn. 369, 69 N. W. Rep. 140.

⁴ *McLane v. Curran*, 133 Mass. 531.

⁵ *Truss v. Old*, 6 Rand. (Va.) 556.

⁶ *Eyre v. Shaftsbury*, 2 P. Wms. 102; *Truss v. Old*, 6 Rand. (Va.) 556.

⁷ *Truss v. Old*, 6 Rand. (Va.) 556.

⁸ *Truss v. Old*, 6 Rand. (Va.) 556.

⁹ *Rex v. Oakley*, 10 East, 491; *Wade v. Baker*, *Ld. Raym.* 130; *Byrne v. Van Hoesen*, 5 John. 66.

evidence that his appointment must be shown by the records, or properly verified copies from the custodian.¹ The fact of his appointment cannot be proved by the declarations or admissions of the guardian, any more than agency can be established by the declarations of the alleged agent.² If the records be destroyed, or any papers or instruments relating to the proceedings be lost, then resort must be had to secondary evidence, and a foundation properly laid, when the fact of the appointment may be proven by secondary evidence of what the record of appointment contained.³ So where the petition authorizing the appointment of a guardian is shown to have been lost, the contents thereof may be proved by parol testimony.⁴

§ 858. Authority of guardian to bind ward by arbitration. Whenever it becomes proper or necessary to submit a claim of a ward to arbitration, the guardian is the person to make all agreements. The ward cannot do so himself, and it would naturally follow that, unless the guardian is authorized by law to act in such cases, there could be no submission to arbitration in matters involving the rights of infants. It is held, therefore, that a guardian may, for and in behalf of his ward, submit a controversy concerning the estate to arbitration, and thereby bind himself in his representative capacity to abide the result.⁵ So it has been held that a guardian may submit a claim for damages arising upon an assault on his ward to arbitration.⁶ And sometimes a guardian is given authority by statute to arbitrate controversies concerning the estate of his ward.⁷ But no one has any authority in law to arbitrate or do any act as guardian until he is properly appointed.⁸

§ 859. Right of guardian to agree to compromise affecting property of ward.— As a general rule, the office of guard-

¹ Halliburton v. Fletcher, 22 Ark. 453. Roberts v. Newbald, Comb. (K. B.) 318; Kelly v. Adams, 120 Ind. 340, 22

² Halliburton v. Fletcher, 22 Ark. 453. N. E. Rep. 317; Callaway v. Bridges, 79 Ga. 753, 4 S. E. Rep. 687; Weed v.

³ Dalton's Appeal, 59 Mich. 352, 26 Ellis, 3 Cai. 253.

N. W. Rep. 539; Halliburton v. ⁶ Weed v. Ellis, 3 Cai. 253.

Fletcher, 22 Ark. 453. ⁷ De Vaughn v. McLeroy, 82 Ga. 687,

⁴ Dalton's Appeal, 59 Mich. 352, 26 10 S. E. Rep. 211.

N. W. Rep. 539. ⁸ Huntsman v. Fish, 36 Minn. 148,

⁵ Hutchins v. Johnson, 12 Conn. 376; 30 N. W. Rep. 455.

ian and the authority existing by virtue of his relation to his ward and estate do not empower or authorize him to agree to any compromise or settlement by which the property interests of his ward may be affected without the concurring sanction and authority of the tribunal to which he must account, and to which he is by law required to look for authority to bind his ward.¹ Sometimes the authority to compromise a claim of his ward is given by statute; and when this is true, a compromise effected by the guardian in compliance with such law will be binding on the ward.² And it is held in Kentucky that the authority exists regardless of statute.³

§ 860. Authority of guardian to sell personal property of ward.— At common law, unless forbidden by statute, the guardian or curator of an estate may sell the personalty belonging to his ward, and a vendee at such sale will take a good title where he acts in good faith and has no notice of fraud on the part of the guardian. “The personal estate may be invested, called in and re-invested, changed and otherwise disposed of, as the exigencies of the trust, in the judgment of the guardian, may seem to require. In every instance he acts under responsibility to his ward for the faithful and judicious discharge of his trust. The stranger who deals with him justly and fairly has a right to presume that the guardian acts for the benefit of the infant.”⁴ The courts of one state will usually presume, in the absence of proof to the contrary, that this is the rule of law in other states.⁵ It has been held that a guardian of a lunatic or spendthrift might sell timber on the land of his ward, though a sale of the realty itself, of which the trees are necessarily a part, could not be effected without the sanction of the proper court.⁶

¹ *Stephenson v. Chappell*, 12 Tex. Civ. App. 296, 36 S. W. Rep. 482.

² *Hagy v. Avery*, 69 Iowa, 34, 29 N. W. Rep. 409.

³ *Manion v. Ohio Val. Ry. Co.*, 99 Ky. 504, 36 S. W. Rep. 530. In this case, however, the claim compromised was an unliquidated demand for a tort.

⁴ Chancellor Kent, speaking for the court, in *Field v. Schieffelin*, 7 Johns. Ch. 150. To like effect see also

Humphrey v. Buisson, 19 Minn. 221; *Mullen v. Wine*, 26 Fed. Rep. 206;

Pardoe v. Merritt (Minn.), 77 N. W. Rep. 552; *Lamar v. Micou*, 112 U. S. 452, 5 Sup. Ct. Rep. 221; *Hunter v. Lawrence's Adm'r*, 11 Gratt. (Va.) 111.

⁵ *Pardoe v. Merritt* (Minn.), 70 N. W. Rep. 552.

⁶ *Ex parte Broomfield*, 1 Ves. Jr. 453; *Inwood v. Twyne*, Amb. 417; *Thompson v. Boardman*, 1 Vt. 367. And see *Ludlow*, *Ex parte*, 2 Atk. 407.

This is especially true where it becomes necessary to use the timber in repairs upon the land.¹ Of course when a guardian makes such a sale he is the proper person to receive the purchase price.² That the guardian may sell trees which have been cut from the land of the ward by trespassers is very clear.³ But it is held that he has no authority to exchange the personalty for realty or otherwise convert it into land.⁴

§ 861. Authority of guardian to lease land of ward.—The guardian, by reason of his relation and duty to his ward and his authority over the property of the infant, may execute a lease of the lands not longer than the period of infancy.⁵ The guardian, unless otherwise provided by statute, need not invoke an order of court to enable him to make a lease. This is his official duty in order to keep the property as productive and profitable as possible.⁶ Ordinarily he may make the lease by private contract or public outcry, taking care to get the best rent possible.⁷ The guardian who has leased land has no right to take credit in his settlement for any expense of repairs made by the tenant, the making of which the law enjoins upon the latter.⁸ In Iowa the statute requires that a lease of land by a guardian be approved by the court; and a lease without authority of the court is voidable.⁹ The authority to lease land does not exist in a parent as natural guardian.¹⁰

§ 862. Authority of guardian over real estate of ward.—The authority and power of a general guardian over the lands belonging to his ward is very limited at common law. This rule is no doubt for the purpose of preserving intact, as far as may be, the real estate belonging to the ward. "The guardian

¹ *Oxeden v. Lord Compton*, 2 Ves. Jr. 69.

² *Thompson v. Boardman*, 1 Vt. 367.

³ *Truss v. Old*, 6 Rand. (Va.) 556.

⁴ *Boisseau v. Boisseau*, 79 Va. 73.

⁵ *Ayre v. Countess of Shaftsbury*, 2 P. Wms. 103, 122; *Truss v. Old*, 6 Rand. (Va.) 556; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; *Whyler v. Van Tiger* (Cal.), 14 Pac. Rep. 846.

⁶ *Palmer v. Cheseboro*, 55 Conn. 114, 10 Atl. Rep. 503.

⁷ *Windom v. Stewart*, 43 W. Va. 711, 28 S. E. Rep. 776.

⁸ *Windom v. Stewart*, 43 W. Va. 711, 28 S. E. Rep. 776.

⁹ *Bates v. Dunham*, 58 Iowa, 308, 12 N. W. Rep. 309; *Alexander v. Buffington*, 66 Iowa, 360, 23 N. W. Rep. 754. And see *Webster v. Conley*, 46 Ill. 13.

¹⁰ *Ross v. Cobb*, 9 Yerg. (Tenn.) 463; *May v. Calder*, 2 Mass. 55; *Anderson v. Darby*, 1 Nott & McC. (S. C. Law), 369.

of the estate has no further concern with or control over the real estate than what relates to the leasing of it and the reception of the rents and profits.”¹ As to making any sale or permanent disposition of the realty, the guardian must have authority expressly conferred by statute. He has none at law.² The guardian can do no act whereby a lien would be fixed upon the land.³ And an order of court authorizing a sale of property of the ward does not warrant an incumbrance of it.⁴

§ 863. Right of guardian to care and control of the estate of his ward.—Generally it is only a guardian who has qualified and given bond, as well as otherwise complied with the requirements of law, that is entitled to the care, control and custody of the estate of his ward, whether it come to him by inheritance, gift or otherwise. A guardian by nature, as a general rule, has not such right.⁵ The regularly appointed guardian becomes the agent of the law to take charge of, care for and administer the estate of his ward.⁶ The payment of an obligation or liability to an infant, therefore, should be made to his statutory guardian, and a payment to the parent as natural guardian will not release the liability.⁷ As a guardian by nature has no right of control over the estate of his child, he cannot be held liable for neglecting to look after or care for it.⁸ But if a parent should appropriate the property of his child to his own use, he will be liable to the infant for its value. The fact that the law does not enjoin upon him the duty, as natural guardian, of looking after and caring for the property of the

¹ 4 Kent, Comm. 228; *Dixon v. Hosick* (Ky.), 41 S. W. Rep. 282; *Byrne v. Van Hoesen*, 5 Johns. 66.

² *Johns v. Tiers*, 114 Pa. St. 611, 7 Atl. Rep. 923; *Dellinger v. Foltz*, 93 Va. 729, 25 S. E. Rep. 998. *Vide*, too, *Kester v. Hill*, 42 W. Va. 611, 26 S. E. Rep. 376.

³ *Johns v. Tiers*, 114 Pa. St. 611, 9 Atl. Rep. 923.

⁴ *O'Herron v. Gray*, 168 Mass. 573, 47 N. E. Rep. 428.

⁵ *Kline v. Beebe*, 6 Conn. 494, 500; *Miles v. Boyden*, 3 Pick. (Mass.) 213; *McDodrill v. Pardee & Curtin Lum-*

ber Co., 40 W. Va. 564, 21 S. E. Rep. 878; *Lamos v. Snell*, 6 N. H. 413; *Johnson's Adm'r v. Johnson's Ex'r*, 2 Hill (S. C. Eq.), 277; *Dagley v. Tolferry*, 1 P. Wms. 285; *French v. Hoyt*, 6 N. H. 370; *Hyde v. Stone*, 7 Wend. 354; *Haynie v. Hall's Ex'r*, 5 Humph. 290; *Miles v. Kaigler*, 10 Yerg. (Tenn.) 10.

⁶ *Gentry v. Owen*, 14 Ark. 396; *Waldrip v. Tulley*, 48 Ark. 297, 3 S. W. Rep. 192.

⁷ *Linton v. Walker*, 8 Fla. 144.

⁸ *French v. Hoyt*, 6 N. H. 370.

child, does not in any sense relieve him from liability for a wrongful conversion.¹

§ 864. Right of guardian to conduct a business for ward.

A guardian is a trustee of the estate of the ward for the purpose of winding it up, or continuing it to the extent necessary for its preservation, according to law. But a guardian cannot engage in business on account of his ward with the trust funds or property, nor can he, of course, incumber or pledge the same to get money to conduct any general business or speculative enterprise. The law on this particular subject is well expressed in the language of Martin, J., in a recent case determined in the court of appeals of New York:² "Stephens, as the general guardian of the infant plaintiff, had no right or authority to embark in or conduct the business of brewing, or the purchase and sale of barley or other merchandise, in the name of his ward, and employ therein the capital or credit of the latter. It is a well established and elementary principle of law relating to the rights and liabilities of trustees, that, in the absence of an express and sufficient authority therefor, the employment of trust property in trade or speculation or in manufacturing is a gross breach of trust upon the part of the trustee. This rule applies even where he simply continues the business or trade of a testator. It is the duty of a trustee to close up the trade or business, to withdraw the funds and invest them in proper security at the earliest convenient moment."³

§ 865. Guardian cannot waive rights of ward.—The legal rights of an infant ward cannot be affected or waived by the admissions or conduct of the guardian. The guardian, whether natural, testamentary or statutory, has no authority in law to deprive an infant of a right by a waiver, admission or any other act which he might waive if he were of age, any more than the infant could deprive himself of such right by waiver or neglect while under age.⁴ Nor has a guardian the right or power to

¹ Van Epps v. Van Deusen, 4 Paige Ch. 64.

² Warren v. Union Bank, 157 N. Y. 250, 51 N. E. Rep. 1036.

³ To like effect, see King v. Talbot, 40 N. Y. 76, 90; Wetmore v. Porter, 92 N. Y. 76; Wilmerding v. McKes-

son, 103 N. Y. 329, 8 N. E. Rep. 665; Kyle v. Barnett, 17 Ala. 306.

⁴ Power v. Harlow, 57 Mich. 107, 23 N. W. Rep. 606; Driver v. Evans, 47 Ark. 297, 1 S. W. Rep. 518; McCloy v. Arnett, 47 Ark. 445, 2 S. W. Rep. 71; Carpenter v. McBride, 8 Fla. 292.

exchange the lands of a ward for other lands, even with the sanction of a court having jurisdiction concerning the ward's estate. The law does not authorize such dealing, and the courts can authorize nothing not warranted by law.¹ And such a court cannot order the sale of the estate of an infant except upon a showing required by law and a strict compliance with the statutes authorizing the sale of the property of infant wards.² And when a guardian is sued in his representative capacity, he cannot prejudice any rights of his ward by an admission in his pleadings or during the trial of the cause.³

§ 866. Foreign guardian — Rights, duties and liabilities.— A guardian appointed to administer property of a ward having a domicile in another state has a duty similar to that of an ancillary administrator. He must administer the trust in his jurisdiction faithfully, accounting therefor as a guardian of domicile must; that is, he must account for it and administer it as required by the laws of the state where the same is situated.⁴ It is, of course, the duty of a foreign guardian to prudently invest the funds of his ward, to the end that an income therefrom may be realized; and in making such investment he may govern himself by the laws of the state of domicile as to taking security, unless the statutes of the foreign state expressly require different action.⁵ As a rule, neither a foreign nor domestic guardian may invest the property or funds of his ward in obligations or securities issued in violation of law.⁶ A foreign guardian has no authority to dispose of any property of his ward beyond the state in which he is appointed.⁷ Nor can he affect property of his ward in another state by consenting to an order of court directing the sale of same.⁸ It is frequently the case that local laws authorize the appointment of a guardian or curator where a non-resident infant has property within the jurisdiction of local courts. When this is true, a guardian

¹ Meyer v. Rousseau, 47 Ark. 460, 2 S. W. Rep. 112.

² Summers v. Howard, 33 Ark. 490; Meyer v. Rousseau, 47 Ark. 460, 2 S. W. Rep. 112.

³ Moore v. Woodall, 40 Ark. 42.

⁴ Succession of Lewis, 10 La. Ann. 789.

⁵ Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. Rep. 221.

⁶ Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. Rep. 221.

⁷ McNeil v. First Congregational Soc., 66 Cal. 105, 4 Pac. Rep. 1096.

⁸ Wilson v. Hastings, 66 Cal. 243, 5 Pac. Rep. 217.

appointed to administer the property within such jurisdiction has no other authority over either the person or estate of the ward than the administrator of the particular property over which he is appointed;¹ and the court having jurisdiction over the foreign guardian may order him to turn over any funds belonging to the ward to the domiciliary guardian.²

§ 867. Authority of guardian to sue in foreign jurisdiction.—The rule is, the authority of a guardian to sue is confined to the courts sitting within the state where he is appointed, and from whose laws he received all his representative authority. He cannot sue in a foreign state, either in the state or federal courts sitting in such foreign state, unless expressly authorized so to do by the laws thereof.³ Where the ward has property interests in two or more states, there must be a guardian in every state in which he has property. These respective guardians will have control and management over the property of the ward in their several states, the guardian in the jurisdiction of the domicile of the ward having the paramount right to the custody of the person, while otherwise the various guardians stand upon the same footing, and none can interfere with the duties of any other.⁴ If the foreign guardian should be guilty of a breach of trust whereby a liability accrued to the ward, he could be sued in the state where his guardianship is pending, if found there. If he has moved away, he may be sued in the state or country in which he is found and served with process.⁵

§ 868. Duty of guardian to require ward to work.—The law forbids a guardian of the person to permit his ward to grow up in idleness and absorb his estate in whole or in part thereby. He must require of the ward, therefore, that he perform such reasonable labor as he may be capable of and fitted for, to the

¹ Linton v. First Nat. Bank, 10 Fed. Rep. 894.

² Earl v. Dresser, 30 Ind. 11.

³ Woodworth v. Spring, 4 Allen (Mass.), 324; Hoyt v. Sprague, 103 U. S. 613, 631; Kraft v. Wickey, 4 Gill & J. (Md.) 332; Smith v. Madden, 78 Fed. Rep. 833; Johnson v. Powers, 139 U. S.

156, 11 Sup. Ct. Rep. 525; Leonard v. Putnam, 51 N. H. 247.

⁴ Kraft v. Wickey, 4 Gill & J. (Md.)

332.

⁵ Moore v. Hood, 9 Rich. (S. C. Eq.) 311. *Vide also* Pratt v. Wright, 13 Grat. (Va.) 175.

extent that this can be done without neglecting the proper educational training of the child.¹ And if he should fail to require his ward to do proper work, whereby he could earn his support in whole or part, he will not be entitled to credit for necessities, except to the extent that the services of the ward for the time not necessary to be spent in school would not compensate for same.² To the end that the guardian may be unhampered by this rule of law, the ward is required to submit to all proper, lawful and reasonable directions of the guardian.³

§ 869. Guardian to carefully manage estate of ward.— The law imposes upon the guardian the duty of so managing the estate under his control as to make it as profitable and productive as practicable. Whenever there are funds on hand which will not be immediately needed and which may be loaned to advantage, it is the duty of the guardian to lend such money at as great a rate of interest as can be obtained with good security, not exceeding, of course, the highest rate allowed by law.⁴ And if a guardian, instead of lending the money of his ward as he should, uses it for his own purposes, he will be liable to the ward for interest as well as the principal so long as he thus uses it.⁵ The rate of interest with which a guardian would be chargeable for conversion or failing to invest funds is that which by proper and reasonable diligence he would have realized with good security.⁶ But it is incumbent on the ward to prove that the guardian could have realized the interest claimed, otherwise he will be chargeable with only legal interest.⁷ Generally a guardian will not be chargeable with compound interest unless he has been guilty of a palpable disregard of official

¹ *Brown v. Yargan*, 74 Ind. 305; *Phillipps v. Davis*, 2 Sneed (Tenn.), 520; *Cohen v. Shyer*, 1 Tenn. Ch. 192, 193.

² *Clark v. Clark*, 8 Paige Ch. 152.

³ *Keith v. Miles*, 39 Miss. 442.

⁴ *Say's Ex'rs v. Barnes*, 4 S. & R. (Pa.) 112; *In re Cousin's Est.*, 111 Cal. 441, 44 Pac. Rep. 182; *In re Noble's Est.*, 178 Pa. St. 460, 35 Atl. Rep. 859; *Hall v. Hall*, 43 Ala. 488. And see

Haden v. Swepston, 64 Ark. 477, 43 S. W. Rep. 393.

⁵ *Say's Ex'rs v. Barnes*, 4 S. & R. (Pa.) 112; *Latham v. Wilcox*, 99 N. C. 367, 6 S. E. Rep. 711; *Fridge v. State to use of Kirk*, 3 Gill & J. (Md.) 463; *Micou v. Lamar*, 1 Fed. Rep. 14.

⁶ *Micou v. Lamar*, 7 Fed. Rep. 180.

⁷ *Moyer v. Fletcher*, 56 Mich. 508, 23 N. W. Rep. 198.

duty;¹ and a guardian will not be charged even with simple interest where he only keeps idle a sufficient amount of money to meet current expenses.² As to testamentary guardians, however, they are not always chargeable with interest where a statutory guardian would be. A testamentary guardian is regarded more as a trustee, and accountable to the chancery court as such. He is not, "upon general principles of equity, chargeable with more interest than he actually receives, or as a faithful and prudent fiduciary he ought, and therefore should be presumed, to have received."³

§ 870. Investment of funds by guardian — Degree of care required.— A guardian in the performance of his trust duties is not required to use extraordinary care in the investment of funds belonging to his ward. Nor is he therefore an insurer of the discretion which he exercises. He is not required to be infallible. When he has exercised, in good faith, the care and caution a reasonably prudent person would exercise in the management of his own property, he has discharged his full duty and will not be liable to his ward for any losses.⁴ On the other hand, of course, when he fails to exercise the required prudence, he will be accountable to the ward for his mismanagement.⁵ And it is the duty of the guardian to keep all funds not needed profitably invested.⁶ Necessarily the question whether a guardian has used proper judgment and due prudence in investing the funds of his ward will generally be one of fact.⁷ And in any event, in order for a guardian to protect himself from liability by reason of the improper handling of funds, he must act in his representative capacity.⁸ The fact that the guardian acts in good faith does not alter the case.⁹

¹ *Mather v. Heath*, 57 Wis. 104, 15 N. W. Rep. 126; *In re Ward's Est.*, 73 Mich. 220, 41 N. W. Rep. 431.

² *Knowlton v. Bradley*, 17 N. H. 458.

³ *Maupin's Ex'r v. Dulany's Devisees*, 5 Dana (Ky.), 589.

⁴ *Barney v. Parsons*, 54 Vt. 623; *Slanter v. Favorite*, 107 Ind. 291, 4 N. E. Rep. 880; *Gott v. Culp*, 45 Mich. 265, 7 N. W. Rep. 767; *Alspaugh v. Adams*, 80 Ga. 345, 5 S. E. Rep. 496; *Rowe v. Sanford*, 74 Mo. App. 191.

⁵ *In re Carver's Estate*, 118 Cal. 73,

50 Pac. Rep. 22; *Appeal of Lechler* (Pa.), 4 Atl. Rep. 451; *Atkinson v. Wittig* (Ky.), 40 S. W. Rep. 457; *Richardson v. Boynton*, 12 Allen (Mass.), 138.

⁶ *Smith v. Dibbrell*, 31 Tex. 239.

⁷ *State v. Slevin*, 93 Mo. 253, 6 S. W. Rep. 68.

⁸ *O'Connor v. Decker*, 95 Wis. 202, 70 N. W. Rep. 286.

⁹ *Booth v. Wilkinson*, 78 Wis. 652, 47 N. W. Rep. 1128.

And he should, when required by the local law, have the authority of the court to which he must account to make an investment, and one otherwise made will be at his own risk.¹

§ 871. Duty of guardian to require security.—As the guardian is a trustee of an express trust and owes to his ward the duty of faithfully administering this trust, it is clear that he should exercise due caution in lending the funds of the ward or selling his property on a credit. The fact that a borrower or purchaser might unexpectedly become insolvent so he could not meet his obligations, a thing of every-day occurrence, should admonish the trustee of a fund or property to guard against such a contingency and require security, to the end that his ward may not suffer in his estate.² So the guardian has no right to use the funds of his ward for his own purposes or in any venture in which he is interested; as, for instance, he will not be permitted to lend them to a partnership of which he is a member, and if he should do so and a loss occur, he and his sureties would be liable to the ward.³

§ 872. Guardian's settlement — Transactions in Confederate money.—As a rule, a guardian has no right to effect any money transaction in currency or funds of any kind which are issued in violation of law. Upon this principle it is held by the highest federal court that an investment by a guardian in his trust capacity of bonds of the Confederate states is void and that he is accountable for the funds or property of the estate belonging to his ward thus unlawfully invested.⁴ In Alabama this doctrine is not carried to the extent adhered to by the highest national tribunal. There it is held that, where a guardian, environed by the disturbed and uncertain condition of the country during the civil war; where he could not, by reason of local military force and civil surroundings, recognize the laws of the United States, and in good faith endeavoring to act to the advantage of his ward, he would not be liable to the estate by reason of a transaction in Confederate money. Say the court: "In the absence of facts or circumstances showing bad

¹ Coffin v. Bramlitt, 42 Miss. 194.

³ State v. Sanders, 62 Ind. 562.

² Konigmacher v. Kimmel, 1 Pen. & W. (Pa.) 207.

⁴ Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. Rep. 221.

faith or gross carelessness, we should not, and will not, deal harshly with trustees who were so unfortunate as to be burdened with a trust in that perilous epoch.”¹ And in a very recent case decided by the supreme court of the United States, it was held that a guardian was not liable to his ward for a loss occasioned by an investment in Confederate bonds in accordance with the laws of the state where the guardianship was pending.²

§ 873. Domicile — Right of guardian to change the domicile of his ward.— The question of the right of a guardian to change the domicile of his ward is one which has, to some extent, vexed the courts. It has been held, and it seems with good sense, that the domicile of an infant is not changed simply by the death of the father and the appointment of a guardian whose domicile is different from that of the infant’s parents at the time of his death. The infant does not acquire the domicile of his statutory guardian merely by operation of law.³ It must follow, then, that if the domicile of the ward can be changed at all before he attains his majority, it must be with the consent of his statutory guardian and under the sanction of the court having probate jurisdiction, or the court to which is intrusted jurisdiction in such matters. Upon the death of the parent the guardian is supposed to take, as near as may be, the relation of the child’s natural supporters; but there can be no perfect substitute for the parent, and it is rarely that any matter of vital importance to the child is left to the unbridled control of the guardian. The frailty of human nature and the temptation that might urge one acting in a fiduciary capacity of this kind are evils that the courts and the law always guard against as far as possible. The inborn affection which a parent

¹ *Stewart v. McMurray*, 82 Ala. 269, 3 S. Rep. 47, following earlier cases to like effect: *Watson v. Stone*, 40 Ala. 451; *Waring v. Lewis*, 53 Ala. 615; *Ferguson v. Lowry*, 54 Ala. 510; *Foscue v. Lyon*, 55 Ala. 440; *Cummings v. Bradley*, 57 Ala. 224; *Nelms v. Summers*, 54 Ga. 605; *McWhorter v. Tarpley*, 54 Ga. 291. To like effect, see also *Baldy v. Hunter*, 98 Ga. 170,

25 S. E. Rep. 416. And see apparently *contra*, *Houston v. Deloach*, 43 Ala. 364; *Hall v. Hall*, 43 Ala. 488.

² *Baldy v. Hunter*, 171 U. S. 388, 18 Sup. Ct. Rep. 890. See also *Bentley v. Dailey*, 87 Ala. 406, 6 S. Rep. 274.

³ *Johnson v. Copeland*, 35 Ala. 521; *School Directors v. James*, 2 Watts & S. (Pa.) 568; *Succession of Lewis*, 10 La. Ann. 789.

feels for his child is wanting in the guardian, and the protection that this affection insures in the natural parent cannot be relied upon to shield the child from imposition at the hands of one who can never feel nor have the interest in the ward that would have existed in the parent. In several states it has been held that a statutory guardian cannot change the domicile of his ward under any circumstances.¹ The contrary rule has also been adhered to.² In the case of *Talbott v. Chamberlain*, recently decided in the supreme judicial court of Massachusetts,³ the court refers to the power of a guardian to change the domicile of his ward, but waives the precise point. The court holds, however, that a ward having sufficient mental capacity to change his domicile may do so with the sanction of the guardian. This privilege seems akin to that which obtains in most, and perhaps all, of the states, allowing a ward, upon arriving at a certain age, to select, with the consent of the court having jurisdiction in such matters, his own guardian. It is also held in this state, where by law it is provided that an infant may in certain cases be adopted by a stranger with the consent of his parents, and when so adopted he becomes the legitimate heir of his new parents, by operation of law, for all legal purposes, that the person so adopting the child with the consent of its parents may then change his domicile.⁴ The conclusion, then, from the authorities, considered in the light of right and good reason as well as justice, would seem to be that a statutory guardian, in the absence of some statutory provision authorizing a guardian to change the domicile and civil status of his ward, has no such power. It might be done through fraud or some unworthy motive, and it is against the policy of the law to permit one occupying a fiduciary relation to do any act

¹ *Mears v. Sinclair*, 1 W. Va. 185; *Daniel v. Hill*, 52 Ala. 430; *School Directors v. James*, 2 Watts & S. (Pa.) 568; *Woodward v. Woodward*, 3 Pickle (Tenn.), 644, 11 S. W. Rep. 892; *Succession of Lewis*, 10 La. Ann. 789. And see *Heistand v. Kuns*, 8 Blackf. (Ind.) 345; *Wheeler v. Hollis*, 19 Tex. 522.

² *Mills, Guardian, v. Hopkinsville* (Ky.), 11 S. W. Rep. 776. But even in

this state the change must be made by the guardian in good faith, not capriciously or fraudulently. In Rhode Island a similar tendency seems to obtain, though the direct point is not squarely decided. *Mowry v. Latham*, 17 R. I. 480, 23 Atl. Rep. 13. And *vide* *Anderson v. Anderson*, 42 Vt. 350.

³ 149 Mass. 57, 20 N. E. Rep. 305.

⁴ *Ross v. Ross*, 129 Mass. 243.

which might redound to his benefit, though it be in the best of faith. Nor can the ward change his domicile of origin or the last domicile of his parents, as the case may be.¹

§ 874. **Domicile of insane person.**—As one *non compos mentis* is not capable of making a contract or binding himself in any way, it follows, upon principle, that such person could not change his domicile, as this is an essential and important step, vitally affecting his legal status and property rights generally. But one who is only of weak intellect, not so far deficient in understanding as to be unable to attend to the ordinary business affairs of life, is capable of changing his domicile at pleasure.² In Massachusetts it has been held that the guardian of an insane person may change or designate a place of residence or domicile for his ward, just as it is held in this state that a guardian may change the domicile of his infant ward.³ The direct question whether a guardian may change the domicile of his insane ward came up in the recent case of *Talbott v. Chamberlain*,⁴ in which case one Stone, who seems to have had sufficient mental capacity to change his domicile, left Massachusetts and took up his abode in Iowa. Before he left, however, there had been filed a petition for the appointment of a guardian over him. He attended one hearing of this petition, and, pending the final result, moved to Iowa. The court, in a very learned opinion, per Allen, J., held that the effect of the removal of the ward to Iowa could not divest the Massachusetts court of jurisdiction of the subject-matter presented for determination, though there was no law which could forbid the change of domicile; that though the courts of Massachusetts had decreed guardianship after the ward had taken up a foreign abode and domicile, this did not fix the general status of the ward as a lunatic or insane person, but merely his local status as one under guardianship in Massachusetts as an insane person, and is conclusive only on the courts of Massachusetts with reference to acts which are re-

¹ *Grimmett v. Witherington*, 10 Ark. 367.

² *Mowry v. Latham*, 17 R. I. 480, 23 Atl. Rep. 13. See also *Holyoke v. Haskins*, 5 Pick. (Mass.) 20.

³ *Holyoke v. Haskins*, 5 Pick. (Mass.) 20.

⁴ 149 Mass. 57, 20 N. E. Rep. 305.

quired by law to be done by the guardian and forbidden to the ward.¹

§ 875. **Right of guardian to sue for seduction.**—One who is merely the legal guardian or curator of the estate of an infant has no right to the domestic services of such child, and being under no legal duty to support or maintain the infant, except so far as he may have property or funds in his hands to be expended for the ward as the law directs, does not sustain the intimate relation of parent or *quasi*-parent to such ward, and cannot sue for her seduction.² And the fact that the ward is being taken care of by the guardian at his own home, especially where she has living parents, though too poor to support her, does not change the rule.³ But where the guardian of an orphan girl is entitled to her domestic services, or where the guardian stands *in loco parentis* to the seduced person, he may recover for her seduction. And this is true also in

¹ The court in this case (*Talbott v. Chamberlain*, 149 Mass. 57, 20 N. E. Rep. 805), among other things, say: "The guardian of an insane person has by law the care and custody of the person of his ward, and it is argued that a person under restraint and in custody cannot be free to choose his own residence. The statute gives very general authority to all guardians of insane persons and spendthrifts alike, sufficient to meet the needs of any class or condition of wards, but the authority is to be exercised only as required by the condition or conduct or circumstances of the ward. The statute does not make it the duty of every guardian to keep his ward in custody. It may be proper for a guardian to allow his ward to go from place to place without restraint, even beyond the limits of the guardian's authority. The law does not prohibit a guardian from allowing his ward to go beyond the limits of the state. The guardianship, in this state, cannot prevent the ward of sufficient mental capacity from acquiring a

domicile in fact in another state, which will be recognized by other courts. The question is, how far will such foreign domicile be recognized by our courts? The consent, express or implied, of the guardian may be required by the domestic courts, as the ward, who removes without such consent, might be held by such events to be in the position of one escaping from lawful authority; but when the ward of sufficient mental capacity to change his domicile is permitted by his guardian to remove from this state, and does in fact acquire a new residence in another state or country, we see no reason why our courts should recognize the foreign domicile, except so far as it affects the relation of guardian and ward within this jurisdiction. To hold otherwise would be to preclude a person under such guardianship from acquiring a foreign domicile for any purpose. We know of no authority which sustains that position."

² *Blanchard v. Ilsley*, 120 Mass. 487.

³ *Blanchard v. Ilsley*, 120 Mass. 487.

the case of a substituted natural guardian, as where a relative or friend takes charge of an infant or orphan to rear.¹

§.876. Testamentary guardian — Appointment.— By virtue of the statutes generally in force in the American states, the father is given authority to a certain extent and under prescribed circumstances to name a future guardian for his infant child.² This right to appoint a guardian for a child includes the authority to name, by last will and testament, a guardian for a child unborn.³ But such right of appointment must be authorized by statute; it does not exist under the old common law.⁴ The authority to thus name a testamentary guardian is in the father. An appointment by the mother would be of no force whatever, unless the mother is thus empowered by statute.⁵ Neither can a grandfather appoint a testamentary guardian of his grandchild; for the relation of parent and child, strictly speaking, does not exist between grandparent and grandchild. Besides, if the grandfather were to appoint a testamentary guardian of his grandchild, this might conflict with an appointment made by the father.⁶ And a testamentary appointment regularly made by the father may be revoked by a

¹ *Bartley v. Richtmyer*, 4 N. Y. 38, 45; *Bracy v. Kibbe*, 31 Barb. 273; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; *Ball v. Price*, 21 Ill. 161, 162; *Ferusler v. Mayer*, 3 W. & S. (Pa.) 416. In this last case the court, in expressly affirming the right of a guardian of the person to maintain an action for the seduction of his ward while the relation exists, said: "Almost every reason on which the right of a father to sue in a case like the present is founded seems to apply to a guardian. He stands in the place of his ward's person, and owes a duty to him in return for which he is responsible. He controls his services according to his condition in life and is bound to educate and maintain him; and its being out of the ward's estate cannot make a difference in this respect. Without the consent or authority of the guardian the ward cannot legally

make contracts or bind himself by indenture or to service. The relation of master and servant exists from the legal control he has over the services of the minor to the same extent, in the case of a guardian, that it does in the case of a father."

² *Thompson v. Thompson* (Ky.), 47 S. W. Rep. 1088.

³ *Earl of Ilchester, Ex parte*, 7 Ves. 341, 368; *Lecone v. Sheires*, 1 Vern. 442; *Fullerton v. Jackson*, 5 Johns. Ch. 278.

⁴ *Earl of Ilchester, Ex parte*, 7 Ves. 341; *Edwards, Ex parte*, 3 Atk. 519; *Wardwell v. Wardwell*, 9 Allen (Mass.) 519.

⁵ *Bedell v. Constable, Vaughn*, 177, 180; *Edwards, Ex parte*, 3 Atk. 519; *Bell, Ex parte*, 2 Tenn. Ch. 327; *Hill v. Hill*, 49 Md. 450. *Vide, too, In re Guardianship of Reynolds*, 11 Hun, 41.

⁶ *Hoyt v. Hilton*, 2 Edw. Ch. 202; *Fullerton v. Jackson*, 5 Johns. Ch. 278.

subsequent will having this effect.¹ This power of appointment exists in the father, though he be an infant at the time of making it.² But the authority of a father to appoint a testamentary guardian of his children extends only to those who are legitimate. He cannot appoint a guardian for his bastard child.³ Sometimes the mother of a bastard is authorized by statute to appoint a testamentary guardian. The testamentary guardian regularly appointed stands to the ward *in loco parentis*, and his authority takes precedence over that of the mother as guardian by nature.⁴ The appointment of the testamentary guardian by the father is considered in law as a kind of continuation of his authority. And the authority thus conferred upon the testamentary guardian continues until the child arrives at full age, unless it is otherwise restricted in the appointment.⁵ But, of course, the appointment is not required to continue for the full period of minority. It may as well be for a shorter time.⁶ There is no form of words necessary to effect the appointment. Any words contained in the will from which it is reasonably clear that the appointment was intended will suffice.⁷ An appointment of a testamentary or other guardian will usually stand for the full period of minority, unless the appointing power limits the time.⁸ So a guardian will continue in authority until the majority of his ward, though the infant would have the right, upon attaining the age of fourteen, to choose another, where this privilege is not asserted.⁹ The appointment, however, can only be effected by an instrument admitted to probate as a will, and it must of course designate the person intended as testamentary guardian.¹⁰

§ 877. Testamentary guardian — Authority of.— The testamentary guardian has no other or greater authority than any other general guardian unless, by the terms and stipulations of the

¹ Earl of Ilchester, Ex parte, 7 Ves. 341, 367; Shaftsbury v. Hannam, Finch (Eng. Ch.), 323; 2 Kent, Comm. 225.

² 2 Kent, Comm. 225.

³ Sleeman v. Wilson, L. R. 13 Eq. 36; Ramsay v. Thompson, 71 Md. 315, 18 Atl. Rep. 592.

⁴ In re Van Houten, 2 Green Ch. (N. J.) 220.

⁵ In re Guardianship of Reynolds, 11 Hun, 41.

⁶ People v. Kearney, 19 How. Pr. 493.

⁷ Kevan v. Waller, 11 Leigh (Va.), 414.

⁸ Jones v. Hays, 3 Ired. (N. C. Eq.) 502.

⁹ Young v. Lorain, 11 Ill. 624.

¹⁰ Describes v. Wilmer, 69 Ala. 25.

testament appointing him, he is given additional powers. When, therefore, a testamentary guardian makes a contract concerning the estate of his ward which is authorized by the will under which he receives his authority, such an agreement will be binding upon the ward.¹ Further, in the event of the necessity of a suit upon such contract, the testamentary guardian is the only necessary party.² The authority of a testamentary guardian is superior to the rights of one appointed by the probate court. For were it otherwise the statutes both in this country and England authorizing the appointment of a testamentary guardian, and defining his rights and duties, would be defeated by an appointment which the courts could not lawfully make.³ If two or more are appointed testamentary guardians their authority will be equal. If one should die the other would succeed to the authority of both.⁴ If only one should qualify and enter upon the discharge of his duties, he would have the authority which all would have had.⁵

§ 878. Joint guardians.—Where it is permissible by law for two or more persons to act in the capacity of guardians of the same ward, their rights, duties and liabilities are very similar to those of trustees, receivers, etc., acting in a joint capacity. If there should be two guardians and one should die, resign or do any other act which would effect a vacancy in his office, all the powers of guardianship would thereafter vest exclusively and effectively in the other guardian.⁶ Or if either should fail or refuse to qualify and enter upon the discharge of the duties incident to the trust, the other might do so, and when this is done he would become the sole guardian, to the same effect as though he alone had been appointed in the first instance.⁷

§ 879. Power of courts to remove guardian.—The courts exercising control over the acts of a guardian may at any time,

¹ Howard v. Cassels (Ga.), 31 S. E. Rep. 562.

² Howard v. Cassels (Ga.), 31 S. E. Rep. 562.

³ Lord v. Hough, 37 Cal. 657, 665; Robinson v. Zollinger, 9 Watts (Pa.), 169.

⁴ Kevan v. Waller, 11 Leigh (Va.), 414.

⁵ Kevan v. Waller, 11 Leigh (Va.), 414.

⁶ Eyre v. Countess of Shaftsbury, 2 P. Wms. 102.

⁷ Kevan v. Waller, 11 Leigh (Va.), 414; In re Guardianship of Reynolds, 11 Hun, 41. See also In re Schoonhoven, 5 Paige, 559; King v. Donnelly, 5 Paige, 46; In re Stephenson, 8 Paige, 420.

for good cause, discharge the guardian and require him to properly account to his successor. This authority is inherent in the courts, and exists for the purpose of protecting the estate of the ward from misconduct at the hands of his guardian. It is not required that a guardian be permitted to continue a reckless and improper course of action in administering and performing the trust confided to him. Nor would this be just to his sureties, for they must bear the burden of his shortcomings, and these should not be unnecessarily extended by permitting the guardian to perform the functions of his trust after it becomes patent that he is not executing the same in a proper and legal manner. For these and other reasons, courts may remove a guardian whenever it is made to appear that he is heedlessly or wilfully neglecting his duty or is not performing it in good faith as the law requires.¹ But the court to which a guardian is accountable has no right to remove him arbitrarily. He has a right to notice of the intended removal and notice of the time thereof, to the end that he may properly resist same if he have any available defense.² Of course, if the guardian should tender his resignation to the court, which he may ordinarily do upon accounting to the ward and court as the law requires, he may be removed or his resignation accepted, which is practically the same thing.³ The tender of a resignation is good cause for removal, even though the guardian could not, by so doing, relieve himself of his trust duties.⁴ But an agreement between a guardian and a stranger to resign, so the latter may be appointed and thereby get control of the estate, is void because against public policy.⁵

§ 880. Authority of guardian to repudiate contracts of his ward.—As a rule, a guardian cannot repudiate the contracts of his infant ward. This privilege is personal to the infant.

¹ King v. King, 73 Mo. App. 78; Gorman v. Taylor, 43 Ohio St. 86, 1 N. E. Rep. 227; Stallings v. Barrett, 26 S. C. 474, 2 S. E. Rep. 483; Deegan v. Deegan, 22 Nev. 185, 37 Pac. Rep. 360; Haden v. Swepston, 64 Ark. 477, 43 S. W. Rep. 393; Thompson v. Hartline, 84 Ala. 65, 4 S. Rep. 18.

² In re Estate of Rose, 66 Cal. 241, 5 Pac. Rep. 220.

³ Brown v. Huntsman, 32 Minn. 466, 21 N. W. Rep. 555; Young v. Lorain, 11 Ill. 624; Wackerle v. People, 168 Ill. 250, 48 N. E. Rep. 123; Lougin v. Delta Bank, 75 Miss. 407, 23 S. Rep. 178.

⁴ Young v. Lorain, 11 Ill. 624.

⁵ Cunningham's Devises v. Cunningham's Heirs, 18 B. Mon. (Ky.) 19.

He might, on coming of age, elect to ratify his agreement, and if the guardian could conclude him by previously repudiating it in his representative capacity he would be thereby deprived of the right to exercise the option of ratifying his liabilities upon attaining majority.¹ This is especially true where the contract is of real benefit to the infant ward.² It has been held, however, that a guardian may sometimes repudiate a contract of an infant which is clearly against his interest.³ And this is particularly true in the case of guardianship of an insane person or spendthrift. And where a guardian of a weak-minded infant procured a conveyance from his ward for an inadequate consideration, it was held that a succeeding guardian might renounce the contract.⁴

§ 881. Duty of guardian to care for estate of ward.—A guardian of the estate of a ward is always required by law to use that prudence, care, attention and cautious management which good business sense dictates. The measure of this duty is usually such care and attention as a prudent person would exercise in managing his own property. And when a guardian fails, neglects or refuses to use such care of the estate under his charge he will be amenable to the injured party for any damage occurring by reason of such failure of duty.⁵ So, if a guardian has the necessary funds of his ward to pay taxes on his property, it is his duty to apply such funds to the extent necessary in keeping down the taxes; and if, instead of thus performing this duty, he suffers the property to be sold for taxes, whereby an injury results to the ward, the guardian will be liable therefor.⁶ And if a guardian should negligently fail to collect rents accruing to his ward, he will be liable for such as could have been realized by the exercise of reasonable diligence.⁷ A guardian who accepts from a predecessor an indi-

¹ Oliver v. Houdlet, 13 Mass. 237.

² Oliver v. Houdlet, 13 Mass. 237.

³ Chandler v. Simmons, 97 Mass. 511.

⁴ Somes v. Skinner, 16 Mass. 348.

⁵ Marquess v. La Baw, 82 Ind. 550; State v. McIntosh, 106 Ind. 364, 6 N. E. Rep. 926; Jones' Appeal, 8 Watts & S. (Pa.) 143; Draper v. Joiner, 9 Humph.

(Tenn.) 612; Stein's Appeal, 5 Wharton (Pa.), 472; Brewer v. Ernest, 81 Ala. 435; Reynolds' Appeal, 70 Mo. App. 576; Konigmacher v. Kimmel, 1 Pen. & W. (Pa.) 207.

⁶ Shurtleff v. Rile, 140 Mass. 213, 4 N. E. Rep. 407.

⁷ Shurtleff v. Rile, 140 Mass. 213, 4 N. E. Rep. 407.

vidual note as part of the assets belonging to his ward will be bound to make good to the ward the value of the property which he should have exacted.¹ And it has been held, where a guardian took security on property worth more than the amount of the loan made for his ward, that he would be liable in damages for neglect of duty, where he permitted the property to sell under foreclosure for an amount much less than the secured debt.² If a guardian should fail to use due care in selecting a bank in which to deposit funds under his control, by reason of which loss results, he will be liable therefor.³

§ 882. Diligence—When sufficient and when not.—Where a guardian deposits money belonging to his ward in bank in his individual right, he will be liable to the ward for it if it be lost by reason of a failure of the bank.⁴ If he wishes to escape this liability he must make the deposit in his representative capacity, using due caution to ascertain the solvency of the bank, and then only deposit the money he is not required to keep invested. But unless a guardian, in lending the money or selling the property of his ward, or otherwise discharging his trust duties, fails to exercise proper prudence, he will not be liable for any loss or injury to the estate, for the law does not make him an insurer of his acts;⁵ and the fact that he may intrust the collection of a debt owing to his ward to an agent or attorney of good standing will not show any lack of diligence.⁶ The same is true where the guardian in good faith employs a lawyer of good repute to conduct litigation for the ward.⁷ The law presumes that a guardian uses proper diligence and judgment in the administration of his trust, and when it is sought to fix a liability for a failure to use proper

¹ Jones v. Jones, 20 Iowa, 388; Crawford v. Brewster, 57 Ga. 226; State v. Greensdale, 106 Ind. 364, 6 N. E. Rep. 926; Lane v. Mickle, 46 Ala. 600; State v. Womack, 72 N. C. 397.

² McLean v. Hosea, 14 Ala. 194.

³ Conigland v. Gooch, 97 N. C. 186, 1 S. E. Rep. 653.

⁴ Jenkins v. Walter, 8 Gill & J. (Md.) 218.

⁵ Konigmacher v. Kimmel, 1 Pen. & W. (Pa.) 207; Knowlton v. Bradley,

17 N. H. 458; Lovell v. Minot, 20 Pick. (Mass.) 116; Windon v. Stewart, 43 W. Va. 711, 28 S. E. Rep. 776; Barney v. Parsons, 54 Vt. 623; Parsley's Adm'r v. Martin, 77 Va. 376.

⁶ Beach v. Moser, 4 Kan. App. 66, 46 Pac. Rep. 202; Appeal of Landmesser, 126 Pa. St. 115, 17 Atl. Rep. 543.

⁷ Hancock v. Cooper (Ky.), 38 S. W. Rep. 883.

diligence, the *onus* is on the party so claiming to establish his contention by affirmative proof.¹

§ 883. Acts of guardian — Good faith — Presumptions.— The law is not quick to presume fraud or bad faith in the conduct of any one, and this rule applies to the acts of a guardian in his fiduciary capacity. He is supposed to act for the best interests of his ward in all that he does or omits to do, and, as a general rule, in order to charge him with misconduct or fraud, the same will have to be supported by affirmative proof, establishing it by the proper standard of evidence.²

§ 884. Guardian must furnish necessities.— Ordinarily an infant who has no parents must look to his guardian for the necessities of life. The guardian stands as a parent. He takes up the duty of caring for the infant where the parent left it off. He succeeds in his trust capacity to the estate of the child, and the law enjoins upon him the duty of furnishing support and necessities in proper keeping with the station and surroundings of the ward, as far as he reasonably can with the means at his command.³ And where the ward has property in two or more states, the domestic guardian is liable in his trust capacity for support.⁴ In the nature of things it will always be necessary for a guardian to exercise a sound discretion in providing necessities for his ward. And when, in good faith, he has thus acted in furnishing support, he will not be amenable to his ward.⁵ He will be entitled to credit for expenditures of this kind, ordinarily, though not previously authorized by court, as the ward is entitled to support out of his estate from time to time as necessity may arise, and it would often be inconvenient and impracticable to get an order of court for every purchase that might become necessary.⁶ Of course the guardian must keep the expenses for support within due bounds.

¹ *Kingsbury v. Powers* (Ill.), 20 N. E. Rep. 767; *Preble v. Longfellow*, 48 Rep. 3; *Same Case*, 131 Ill. 182, 22 Me. 279.
N. E. Rep. 479.

⁴ *Kraft v. Wickey*, 4 Gill & J. (Md.)

² *Duck Island Club v. Bexstead*, 174 Ill. 435, 51 N. E. Rep. 831. And see

⁵ *Gott v. Culp*, 45 Wis. 265, 7 N. W. Rep. 767.

Reedy v. Camfield, 159 Ill. 254, 42 N. E. Rep. 833.

⁶ *In re Besondy*, 32 Minn. 385, 20 N.

³ *Gott v. Culp*, 45 Wis. 265, 7 N. W. W. Rep. 366; *Appeal of Albert*, 128 Pa. St. 613, 18 Atl. Rep. 347.

He will not be permitted to indulge his ward in extravagance or unnecessary luxuries.¹ He must always respect the proper orders and directions of the court having jurisdiction with reference to expenditures for education and other necessities of the ward.² And a guardian of the estate merely is not entitled to any credits for the support of his ward where the parents are living and able to care for the child.³

§ 885. **When corpus of the estate may be resorted to for support.**—It is a general rule that only the proceeds or profits arising from the property of the ward may be applied to the purposes of education, support and maintenance.⁴ It is the policy of the law to foster and assure economy in the care and support of the infant. And to extend the rule, the guardian might be tempted to improperly hazard the interests of the ward by going beyond discreet bounds. But an exception to the rule is found in cases where it clearly appears prudent and wise, in order to give the ward the greatest possible benefit of his estate, to invade the *corpus* of his property and sell the same for this purpose.⁵ Whether or not the guardian, in order to get credit for such an expenditure, must first apply for and receive the sanction and authority of the court having jurisdiction in such matters, is a question upon which the authorities are not entirely harmonious. It has been held that he will not be entitled to credit for such outlay in some jurisdictions.⁶ Under this theory of the law it is held, too, that the verbal authority of the judge of the court in vacation will not authorize the expenditure, nor entitle the guardian to credit for same.⁷ But it certainly seems that the more reasonable, liberal, just

¹ In re Mells, 64 Iowa, 391, 20 N. W. 486.

² Loyd v. Malone, 23 Ill. 43; Cumming v. Simpson's Adm'r (Va.), 1 S. E. Rep. 657.

³ Windon v. Stewart, 48 W. Va. 711, 28 S. E. Rep. 776.

⁴ Bellamy v. Thornton, 103 Ala. 404, 15 S. Rep. 833; East Greenwich Institute v. Shippee (R. I.), 40 Atl. Rep. 872; Mahony v. Mahony, 41 La. Ann. 135, 5 S. Rep. 645.

⁵ Bellamy v. Thornton, 103 Ala. 404,

15 S. Rep. 831; Chaplin v. Moore, 7 T. B. Mon. (Ky.) 150, 171; Davis v. Harkness, 1 Gilm. (Ill.) 173; Preble v. Longfellow, 48 Me. 279; Beeler v. Dunn, 3 Head (Tenn.), 87.

⁶ Boyd v. Hawkins, 60 Miss. 277; Smythe v. Lumpkin, 62 Tex. 242; Jones v. Parker, 67 Tex. 76, 3 S. W. Rep. 222; Thorington v. Thorington, 99 N. C. 118, 5 S. E. Rep. 414; Phillips v. Davis, 2 Sneed (Tenn.), 520.

⁷ Jones v. Parker, 67 Tex. 76, 3 S. W. Rep. 222.

and enlightened doctrine is, when it is properly made to appear to the court that the rents and profits of the estate of a ward are not sufficient for his proper maintenance and education, the guardian may, in good faith, and to the extent that it is prudent and necessary, even advance funds of his own towards such a purpose, and, upon making a showing to the satisfaction of the proper court that this has been done necessarily and in good faith, the court may order a credit in the accounts of the guardian accordingly, though this would require the invasion of the body of the estate, as it may generally ratify and adopt any act which it could in the first instance have authorized.¹

§ 886. Step-child — Duty of guardian to support — Rights of guardian.— As a parent is not bound in law to support his step-child, a general guardian of such a child may contract with another — even with the step-father — for such necessities as her station and condition in life require; and when the necessities are thus furnished, the guardian will be entitled to a credit for the same in the settlement of his ward's estate.²

§ 887. Support of ward — Right of guardian to charge for — Rule where ward lives in family of guardian.— If the guardian takes his ward into his family, where the child works in a domestic way and receives support from the guardian, the presumption of law is that such support and services are mutual, and in cases of this kind the guardian has no authority to charge the estate of the ward for the support thus given him.³ This is the rule, also, where the ward continues to live with the guardian after attaining majority.⁴

¹ *Hyland v. Baxter*, 98 N. Y. 610; *Karney v. Bale*, 56 Ind. 542; *Stewart v. Lewis*, 16 Ala. 734; *Calhoun v. Calhoun*, 41 Ala. 369; *Waldrom v. Waldrom*, 76 Ala. 285; *East Greenwich Institute v. Shippee (R. I.)*, 40 Atl. Rep. 872; *Cummins v. Cummins*, 29 Ill. 452; *Roseborough v. Roseborough*, 3 Baxt. (Tenn.) 314; *Hobbs v. Harlan*, 10 Lea (Tenn.), 268; *Jarret v. Andrews*, 7 Bush (Ky.), 311; *Bel-*

lamy v. Thornton, 103 Ala. 404, 15 S. Rep. 831.

² *In re Ackerman*, 116 N. Y. 654, 23 N. E. Rep. 552; *Latham v. Myers*, 57 Iowa, 519, 10 N. W. Rep. 924.

³ *Marquess v. La Baw*, 82 Ind. 550; *Brown v. Yargan*, 74 Ind. 305; *Moyer v. Fletcher*, 56 Mich. 508, 23 N. W. Rep. 198; *Otis v. Hall*, 117 N. Y. 131, 22 N. E. Rep. 563.

⁴ *Boardman v. Ward*, 40 Minn. 399, 42 N. W. Rep. 202.

§ 888. **Liability of guardian for necessities.**—There is, generally speaking, no personal liability of a guardian for necessities of his ward unless he shall have assumed the relation of a parent towards the child, furnishing support and receiving the domestic services of the infant in return, or otherwise acting in the capacity of a parent.¹ The guardian, as such, is only liable for necessities in his representative capacity, and then only to the extent of the property in his charge which could be subject to the payment of the expense of support.² As a rule, a guardian has no right to exceed the income of the ward in furnishing necessities;³ and in no case will there be a liability on the part of the guardian, either personally or in his trust capacity, for necessities furnished his ward without his consent or authority, where he is ready and willing to furnish them as far as the estate will permit.⁴ And the fact that the guardian may have paid for necessities furnished his ward will not make him liable in future for necessities of a like nature.⁵ As a general rule, a guardian will be entitled to credit in his settlements for taxes, repairs and insurance on the property of the ward and for necessary board, clothing, lodging, medical attention and like expenditures.⁶

§ 889. **Necessaries of ward — Who chargeable for.**—As a general rule, the guardian alone is chargeable for necessities furnished his infant ward. He has or is entitled to the custody and control of the funds of the ward as well as of his person. The foundation of this right of custody of the child and management of his estate is the presumption of law that, being an infant and incapable of entering into a contract, usually, the law requires that some one of mature years have the care of the child during minority as well as of his estate. So, when there is a regularly appointed and acting guardian of an infant, the guardian alone is responsible for necessities. Not even these can be charged to the infant, for it is the official duty of the

¹ Call v. Ward, 4 Watts & S. (Pa.) 118; Overton v. Beavers, 19 Ark. 623.

² Davis v. Harkness, 1 Gilm. (Ill.) 178.

³ Barnes v. Ward, Busb. (N. C. Eq.) 93; Villard v. Robert, 2 Strob. (S. C. Eq.) 40.

⁴ Edmunds v. Davis, 1 Hill (S. C.), 279; Forester v. Forester, 6 Mass. 58; Overton v. Beavers, 19 Ark. 623.

⁵ Prescott v. Cass, 9 N. H. 93; Overton v. Beavers, 19 Ark. 623, 629.

⁶ Mahony v. Mahony, 41 La. Ann. 135, 5 S. Rep. 645.

guardian to furnish his ward with the necessities of life so far as the estate of the infant will permit, and to exercise a sound discretion in so doing.¹ And the law presumes that a guardian discharges this duty in supplying his ward with the necessities of life.²

§ 890. Necessaries — Liability of succeeding guardian.—

As a rule, a succeeding guardian is not liable for expenses incurred by a former guardian in furnishing necessities to the ward. If the outgoing guardian wished to take credit for this expense, he should have asked it in his settlement.³ Further, the estate of the ward is not liable for such expenditure to the prior guardian after he has surrendered his authority as guardian.⁴

§ 891. Necessaries — Right of guardian to direct.—

When a person is the legal guardian of the person of an infant, he stands to such ward in the relation of a *quasi*-parent, and has the right, by virtue of this relationship, to manage and direct the furnishing of necessities to the exclusion of strangers and third persons.⁵ And if another should assume to sell the ward necessities without the knowledge or consent of the guardian, though the same be proper for the child, he will have no right of action against the estate of the infant unless it be affirmatively shown that the guardian had improperly failed or neglected to do so.⁶ If a cause of action should accrue to a third person for necessities furnished a ward, this would have to be enforced in a court having jurisdiction of matters arising upon contract, and this may be lacking in the tribunal having authority over the guardian.⁷ When this is true, the remedy, of course, must be sought in a different court.

¹Freeman v. Bridger, 4 Jones (N. C.), 1; Hussey v. Roundtree, Busb. (N. C.) 110; Ruble v. Cottrell, 57 Ark. 190, 21 S. W. Rep. 33; Walker v. Browne, 3 Bush (Ky.), 686.

²Freeman v. Bridger, 4 Jones (N. C.), 1; State v. Cook, 12 Ired. (N. C.) 67.

³Bates v. Hall (Ky.), 47 S. W. Rep. 216.

⁴Bates v. Hall (Ky.), 47 S. W. Rep. 217.

⁵Call v. Ward, 4 Watts & S. (Pa.) 118; In re Van Houten, 2 Green Ch. (N. J.) 220; Guthrie v. Murphy, 4 Watts (Pa.), 80.

⁶Call v. Ward, 4 Watts & S. (Pa.) 118; Guthrie v. Murphy, 4 Watts, 80.

⁷Cresswell v. Matthews, 53 Ark. 87, 12 S. W. Rep. 158.

§ 892. **Duty of guardian to care for ward.**— As a guardian of the person stands in the place of a parent to his ward, it is his official duty to exercise due care to protect the ward from exposure, sickness, danger or injury. Upon this principle it has been held that a guardian would be liable to his ward for an injury from frost, caused by the failure of the guardian to provide suitable clothing, this being within the resources at his command as guardian.¹

§ 893. **Preservation of estate of ward — Advancements for, by guardian — Right to credit.**— As it is the duty of a guardian to properly protect the estate of his ward from waste or deterioration, it is usually held that he will be entitled to a credit for any proper and necessary expenses individually incurred to protect the estate or keep the same in proper repair, though not previously authorized by the court.² Of course, it is always safer for the guardian to first get the sanction of the court to which he must account, and this would be especially true if the outlay would require part of the *corpus* of the estate. The criterion for determining whether the guardian would be entitled to credit in such instances seems to be: “If it is clear that the court to which the guardian must account would have authorized the expenditure in the first instance, it would be proper to allow it where the outlay has been necessarily and properly made before; for there is no difference in the two cases, so far as the ward or his property rights are concerned, except in name or form, for the consequences are identical.”³ Upon this principle, where a guardian replaced old gin machinery on the plantation of his ward, which was necessary in order to keep the property profitable, he was allowed credit for the expenditure.⁴ And further, a guardian should ordinarily be allowed credit for expenditures for clothing, board and like necessities for his ward.⁵ But if the guardian should take his ward into his family and treat him as a member

¹ Nelson v. Johansen, 18 Neb. 180, 24 N. W. Rep. 730. Tulley, 48 Ark. 297, 300, 3 S. W. Rep. 192.

² Kilpatrick's Appeal, 113 Pa. St. 46; Waldrip v. Tulley, 48 Ark. 297, 3 S. W. Rep. 297. ⁴ Waldrip v. Tulley, 48 Ark. 297, 3 S. W. Rep. 192.

³ Maupin's Ex'r v. Dulany's Devises, 5 Dana (Ky.), 589; Waldrip v. Appeal (Pa.), 9 Atl. Rep. 272. ⁵ Maupin's Ex'r v. Dulany's Devises, 5 Dana (Ky.), 589; Wildoner's

thereof, he would not then be entitled to any credit for expenses of this kind; for receiving him into his family to be reared is inconsistent with an intention to charge for support.¹ Where the guardian advances his own funds for the ward beyond the income of the estate, it is held that he will not be permitted to credit himself with interest on that part of the advancement in excess of the income.²

§ 894. Authority of guardian to pay incumbrance on property of ward.—Whenever it becomes necessary, in order to protect the estate of the ward from ruinous sale or to make the same more profitable to the ward, the guardian may sometimes pay off an incumbrance, and he will be entitled to reimbursement for his outlay in his settlement of accounts.³ And it has been held that costs paid by a guardian in good faith in litigation involving the validity of a deed to property claimed for the infant should be borne by the estate.⁴

§ 895. Liability of guardian when he exceeds his authority.—The law circumscribes the authority of guardians within proper bounds. This is necessary for the protection of the property and other rights of the ward. When, therefore, the guardian performs any act, whether it be an unauthorized contract or other act not warranted by law, by reason of which a cause of action accrues to a third person, the guardian alone, not the ward or his estate, will be liable.⁵ In other words, the guardian cannot ordinarily bind the estate by contract. Therefore, if the guardian contract an unlawful debt, and attempt to secure or pay it by mortgaging or selling, as guardian, the estate

¹ McDowell v. Caldwell, 2 McCord (S. C. Eq.), 43.

² McDowell v. Caldwell, 2 McCord (S. C. Eq.), 43.

³ Switzer v. Switzer (N. J. Eq.). 41 Atl. Rep. 486.

⁴ Ramsay v. Joyce, 1 McM. (S. C. Eq.) 236.

⁵ Howard v. Cassels (Ga.), 31 S. E. Rep. 562; Estate of Page, 57 Cal. 238; Clark v. Casler, 1 Cart. (Ind.) 243; Bowman v. Tallman, 2 Rob. (N. Y. Sup. Ct.) 385; Underwood v. Milligan,

10 Ark. 254, 256; Foster v. Fuller, 6 Mass. 58; Lovelace v. Smith, 39 Ga. 130; Fessenden v. Jones, 7 Jones (N. C. Law), 14; Gaudy v. Babbitt, 56 Ga. 641; Bomford v. Grimes, 17 Ark. 567; Harrison v. McClelland, 57 Ga. 531; Yarbrough v. Ward, 34 Ark. 204; Tucker v. Grace, 61 Ark. 410, 33 S. W. Rep. 530; Simms v. Norris, 5 Ala. (N. S.) 42; Bicknell v. Bicknell, 111 Mass. 265; Moore v. Bannerman (Tex. Civ. App.), 45 S. W. Rep. 825.

of his ward, such mortgage or sale will be void.¹ If a person thus dealing with a guardian who exceeds his authority knows, or should know, that the acts of the guardian are unauthorized, he will be in no better attitude than the guardian, and will be forbidden to claim any property or right against the estate of the ward; for such conduct is in effect a collusion with the guardian to effect an unlawful purpose or act, and neither the guardian nor the stranger thus dealing with him will be permitted to profit at the expense of the ward by such conduct.² If a guardian should execute to another a contract or obligation in his capacity of guardian, he would become personally liable thereon, for a guardian cannot fix a liability upon his ward by any contract which he may make.³ But while a guardian is liable on the contract which he enters into, though made in his representative capacity, yet he is not liable either in his official or personal character for any debt contracted by the ward, though it be in reference to his estate or even for necessities.⁴

§ 896. Guardian liable to ward for breach of trust or omission of duty.—As the guardian has an express trust to perform, it is elementary that he is liable to the *cestui que trust* for any injury resulting in the improper discharge or the omission of his official duties. So, if a guardian converts the property of his ward to his own use, or makes a sale thereof which is not warranted or authorized by law, he will thereby at once become liable to the ward for the value of the thing sold or converted, as the case may be.⁵ The ward will also be entitled to recover interest from the time of the conversion.⁶ If a guard-

¹ Warren v. Union Bank, 157 N. Y. 259, 51 N. E. Rep. 1036.

² Warren v. Union Bank, 157 N. Y. 259, 51 N. E. Rep. 1036. And see Deobold v. Opperman, 111 N. Y. 531, 19 N. E. Rep. 94.

³ Thatcher v. Dinsmore, 5 Mass. 299; Wallis v. Bardwell, 126 Mass. 366; Brown v. Eggleston, 53 Conn. 110, 2 Atl. Rep. 321; McKinney v. Jones, 55 Wis. 39, 12 N. W. Rep. 381; Fessenden v. Jones, 7 Jones (N. C. Law), 14; O'Herron v. Gray, 168 Mass. 573, 47

N. E. Rep. 429; Wallis v. Neale, 43 W. Va. 529, 27 S. E. Rep. 227.

⁴ Freeman v. Bridger, 4 Jones (N. C. Law), 1; Fessenden v. Jones, 7 Jones (N. C. Law), 14; Baird v. Steadman, 39 Fla. 40, 21 S. Rep. 572; Overton v. Beavers, 19 Ark. 623.

⁵ Chesnau v. Girod, 2 Mart. (N. S.) 612; Alexander v. Alexander, 20 N. C. 472, 27 S. E. Rep. 121; Ingenhuett v. Hunt (Tex. Civ. App.), 39 S. W. Rep. 310.

⁶ Chesnau v. Girod, 2 Mart. (N. S.) 612.

ian should invest the funds of his ward without authority of court, he will be liable to the ward for any losses by reason of such unauthorized act, though he may have acted in the best of faith.¹ If he should cultivate the land of his ward instead of renting it, he would be liable for the rental value.² Liability for all such acts applies also to a stranger who improperly assumes to act as guardian.³

§ 897. Guardian must file proper settlements of his account at the proper intervals.—The law requires a guardian to file with the court to which he must account, and from which he derives his authority as guardian, a settlement of his accounts at certain stated intervals. This is for the purpose of keeping the transactions of the guardian straight and to afford a judicial investigation of his acts, to the end that, when it appears that the guardian is not complying with the law or discharging his duty, he may be removed, if necessary, and his sureties required to make good his shortcomings.⁴ If a guardian should represent more than one ward, he should, in making his settlements with the court, file separate accounts for each ward.⁵ And if he should improperly file consolidated accounts for all his wards, or a number of them, the court will strike out such accounts of its own motion, and will require him to file other settlements showing the accounts of the several wards separately.⁶ The law makes it the duty of the courts to do this, for they are charged with a kind of superintending care over the estates of infants.⁷ Where a person is both executor of an estate and testamentary guardian of the heir, he should file his settlement as executor with the proper court before filing his settlement as guardian, as this will enable him to charge himself with the correct amount for which he is accountable to the ward.⁸ As a rule, the legitimate costs inci-

¹ Osborn v. Munroe (N. J.), 5 Atl. Rep. 898.

² Parlin v. Webster (Tex. Civ. App.), 43 S. W. Rep. 569.

³ Honseal v. Gibbes, 1 Bal. (S. C. Eq.) 482; Davis v. Harkness, 1 Gilm. (Ill.) 173.

⁴ Crown v. Reed, 38 Ark. 482; Smith v. Vennard (La.), 24 S. Rep. 283.

⁵ Hescht v. Calvert, 32 W. Va. 215, 9 S. E. Rep. 87; Crow v. Reed, 38 Ark. 482.

⁶ Crow v. Reed, 38 Ark. 482.

⁷ Rightor v. Gray, 23 Ark. 228.

⁸ Appeal of Fish (Pa.), 7 Atl. Rep. 222.

dent to the settlement of a guardian should be paid out of the estate of the ward.¹

§ 898. Guardian's settlement — Exceptions.— When any person is aggrieved by a settlement of a guardian, he may come into the court where the proceedings in guardianship are pending and file exceptions to the acts and doings of the guardian and have the issues thus raised tried by the court and determined.² Any improper allowance made in favor of the guardian may thus be corrected. So if the guardian should take credit for an amount for which he has received credit in a previous settlement, the ward will be entitled to have the improper credit stricken out.³ The infant will usually be the person aggrieved by an improper settlement; and so he must, in excepting to the settlement, assail the acts of his guardian. It is clear that he must do this through some representative other than the guardian. This being the case, he may except through next friend, or his parent as next friend.⁴

§ 899. Guardian's settlement — Confirmation.— When a guardian has faithfully performed his duties according to law, he will be entitled to a confirmation and approval of his accounts.⁵ This is for the purpose of showing judicially that he has complied with his legal duties and responsibilities as far as such settlement shows, and he is protected accordingly. But the confirmation of a guardian's settlement is only "an adjudication of all matters involved in, or which properly belong to, the proper accounting for moneys with which the guardian was chargeable," and does "not adjudicate the subject of the guardian's negligence in the management of the ward's real estate, unless that subject was embraced in the report."⁶

§ 900. Guardian's settlement — When guardian not entitled to confirmation.— Unless the settlement of a guardian

¹ *Huntsman v. Fish*, 36 Minn. 148, 80 N. W. Rep. 455.

² *Crow v. Reed*, 38 Ark. 482.

³ *Hunt v. Hines* (R. L.), 42 Atl. Rep. 867.

⁴ *Eastland v. Williams' Estate* (Tex. Civ. App.), 45 S. W. Rep. 412.

⁵ *Crow v. Reed*, 38 Ark. 482.

⁶ *Wainwright v. Smith*, 106 Ind. 239, 6 N. E. Rep. 333. See, too, *Henley v. Robb*, 83 Tenn. 474, 7 S. W. Rep. 190.

be legal and free from fraud, the guardian will not be entitled to a confirmation until he has expunged all improper charges and items and fairly brought himself within the requirements of the law.¹ And if a settlement of a guardian be improper on its face, the court will refuse to confirm it, even though there be no exceptions filed thereto; for it is the duty of the courts to see that their officers fully discharge the trust imposed upon them as the law requires.² Whenever the guardian obtains or claims any credit based upon his fraudulent act or representation, the court may always correct the settlement to conform to the legitimate transactions and fix the liability of the guardian accordingly.³ Nor will it avail the guardian that he did not know his representations to be untrue, or that he in good faith believed them true. If untrue they do not entitle the guardian to the credit, and his want of knowledge of the true facts can have no bearing.⁴

§ 901. Settlement of guardian — Liability of guardian arising by reason of illegal settlement — When fixed.— It is of course the duty of all guardians to make settlements with the proper courts at the time the law requires. But a failure to discharge this duty, or the making of a settlement which, for any cause, is not proper or should not be allowed or confirmed, does not fix a liability upon either the guardian or his sureties. It is only when the court has judicially ascertained the irregularity of the settlement and the liability of the guardian, either from complete failure to settle or because of an improper settlement, that the liability attaches.⁵ So, where the settlement of a guardian shows a balance due from him, this fixes no liability where there has been no final settlement of his accounts as guardian, and an order by the court having jurisdiction requiring the guardian to pay the balance.⁶ And as no action can

¹ Crow v. Reed, 38 Ark. 482.

² Crow v. Reed, 38 Ark. 482.

³ Slanter v. Favorite, 107 Ind. 291, 4 N. E. Rep. 880; In re Hawley, 104 N. Y. 250, 10 N. E. Rep. 352.

⁴ Slanter v. Favorite, 107 Ind. 291, 4 N. E. Rep. 880.

⁵ Davis v. Drew, 6 N. H. 399; Ball v. La Clair, 17 Neb. 39, 22 N. W. Rep. 118; Sebastian v. Bryan, 21 Ark. 447;

Connelly v. Weatherby, 33 Ark. 658;

O'Brien v. Strang, 42 Iowa, 643;

Bieder v. Steinhauer, 15 Abb. N. C.

428; Vermilya v. Bunce, 61 Iowa,

605, 16 N. W. Rep. 735; Bisbee v.

Gleason, 21 Neb. 534, 32 N. W. Rep.

578; Perkins v. Stimmel, 114 N. Y.

359, 21 N. E. Rep. 729.

⁶ Kugler v. Prien, 62 Wis. 248, 23

N. W. Rep. 396; Sebastian v. Bryan,

be maintained against a guardian until he is judicially found in default and ordered to pay, it naturally follows that until then his sureties are not liable, as their liability cannot be greater than that of their principal.¹ But it is not proper for a court to adjudge a guardian to pay over any amount to the ward or succeeding guardian, as the case may be, unless the guardian be regularly in court and given an opportunity to exculpate himself.² So, where the guardian of a minor, who had died pending the guardianship, and upon whose estate there had been appointed an administrator, was, without notice or opportunity to be heard, ordered by the court appointing him to deliver and turn over to the administrator of the infant all property and effects in his hands or control in his fiduciary capacity, it was held that such an order would be quashed on *certiorari*.³ The proper practice in such cases is to require the guardian to first make settlement of his guardianship and then order him to deliver to the administrator the property which is judicially found by the court to be in the hands of the guardian and subject to the order of the court.⁴

§ 902. Guardian's settlement not subject to collateral attack after confirmation.— When the settlement of a guardian is confirmed and approved by the court having jurisdiction in such matters, the action of the court becomes *res judicata*, in a sense, and its action, if wrong, must be reviewed on appeal or by direct proceedings for fraud or other ground. The confirmation when made is not vulnerable to collateral attack. Until set aside or reversed it is effective in all courts.⁵ Not being subject to collateral attack, the confirmation cannot be corrected by the writ of *certiorari* if the court ordering the confirmation has jurisdiction of the subject-matter and the parties in interest.⁶ If, however, the court be without jurisdiction to make the order of confirmation, the proceedings may be quashed on *certiorari*.⁷

21 Ark. 447; *Newton v. Hammond*, 38 Ohio St. 430; *Tuttle v. Northrup*, 44 Ohio St. 178, 5 N. E. Rep. 659; *Commonwealth v. Moltz*, 10 Pa. St. 527.

¹ *Connelly v. Weatherby*, 33 Ark. 458.

² *Rightor v. Gray*, 23 Ark. 228:

Spencer v. Houghton, 68 Cal. 82, 8 Pac. Rep. 679.

³ *Egner v. McGuire*, 7 Ark. 107; *Rightor v. Gray*, 23 Ark. 228.

⁴ *Egner v. McGuire*, 7 Ark. 107.

⁵ *Norton v. Miller*, 25 Ark. 108.

⁶ *Phelps v. Buck*, 40 Ark. 219.

⁷ *Phelps v. Buck*, 40 Ark. 219.

§ 903. Duty of guardian to settle with ward upon attaining majority.—As the guardianship ceases when the ward becomes of age, it naturally follows that he is then entitled to an accounting and settlement at the hands of his guardian. But settlements with a ward soon after arriving at the age of twenty-one will usually be scrutinized carefully by the courts, for the guardian is supposed to have some influence over his ward, even after attaining majority. And where a guardian makes an unfair or fraudulent settlement with his ward on arriving at maturity, the courts are always ready to open the settlement and uncover any fraud that may exist, even though the ward may have executed a full release and acquittance to the guardian.¹ So where a guardian makes a settlement with his ward upon arriving at majority by executing to him his note for the balance due and taking in return a release from the ward, it is void.² Such a transaction is a palpable imposition on the ward, as he would be thereby deprived of the protection of the security which the guardian gives for the faithful performance of his duty if the acquittance should be binding. Of course a guardian cannot make a valid settlement with his ward before he arrives at majority.³ And the fact that the judgment of the court recites that the ward is of age will not preclude the right to relief when the ward is not *sui juris*.⁴ If the guardian makes his final settlement with his adult ward in good faith, and it is accepted and approved by the ward with knowledge of all the facts, this will cure irregularities in the appointment.⁵ It will also cure other irregularities in the administration of the trust.⁶

§ 904. Final settlement.—When the ward attains the age of majority the guardian then has no further authority over either his person or property. The ward can then act for himself. It is therefore the duty of the guardian, as soon as convenient after the arrival of his ward at majority, to make his

¹ Say's Ex'rs v. Barnes, 4 S. & R. 345; Jones v. Parker, 67 Tex. 76, 3 S. (Pa.) 112; Powell v. Powell, 52 Mich. W. Rep. 222.

432, 18 N. W. Rep. 203.

⁴ Turrentine v. Daly, 82 Ala. 205, 3

² Fridge v. State to use of Kirk, 3 S. Rep. 16.

Gill & J. (Md.) 103.

⁵ Seward v. Didier, 16 Neb. 58, 20

³ Hiestand v. Kuns, 8 Blatchf. (Ind.) N. W. Rep. 12.

⁶ Clark v. Van Court, 100 Ind. 113.

final and ultimate settlement with the court to which by law he is required to account, and deliver up and turn over to his late ward what the court adjudges he is in law bound to thus account for.¹ This accounting must be confined to transactions before the attainment of majority by the ward. All acts of the guardian after that may be questioned by the ward as any other liability between two persons both of whom are *sui juris* and capable of asserting their respective rights in the courts.² If the guardian should fail to account to the ward for the amount thus adjudged to be due, the ward may recover the same from him and his sureties.³ Upon final settlement the ward is entitled to the amount shown to be due him, and the guardian must make payment to the adult ward, not to any other person.⁴

§ 905. Guardian must give bond for faithful performance of his trust.—The law requires, that the guardian, before entering upon his duties, execute a bond in a sufficient sum and with adequate sureties for the faithful performance of his duties.⁵ The reason why security is always required of a guardian is to protect the ward from injury at the hands of the guardian by reason of any improper or illegal act or conduct on his part whereby an injury accrues to the ward or his estate. The appointment of a guardian, therefore, is not complete and he has no legal capacity to do any act in his capacity of guardian until he has given bond for the faithful discharge of his duties as required by law.⁶ But when the court having jurisdiction in such matters makes the appointment, the law presumes that proper bond was first executed.⁷ As a rule, where the statute requires a guardian to give security for the faithful performance of his duties, it is necessary that both the guardian and sureties execute the bond in due form.⁸ The necessity for the execution of the bond by the principal arises from the

¹ In re Allgier, 65 Cal. 228, 3 Pac. Rep. 849.

² In re Allgier, 65 Cal. 228, 3 Pac. Rep. 849.

³ Clements v. Ramsey (Ky.), 4 S. W. Rep. 311; Knepper v. Glenn, 73 Iowa, 730, 36 N. W. Rep. 763.

⁴ Jacobson v. Anderson (Minn.), 75 N. W. Rep. 607.

⁵ Palmer v. Oakley, 2 Doug. (Mich.)

433; Sebastian v. Bryan, 21 Ark. 447; Hartman v. Commonwealth (Pa.), 13 Atl. Rep. 780; Schoenleber v. Burkhardt, 94 Wis. 575, 69 N. W. Rep. 343.

⁶ Guynn v. McCauley, 32 Ark. 97.

⁷ Schoenleber v. Burkhardt, 94 Wis. 575, 69 N. E. Rep. 343.

⁸ Gay v. Murphy, 134 Mo. 98, 34 S. W. Rep. 1091; Painter v. Mauldin (Ala.), 24 S. Rep. 769.

fact that it is his undertaking to faithfully perform his official duties. The sureties do not undertake to do anything in an official or trust capacity, but only to indemnify the aggrieved party from damages or an injury arising from a failure or neglect of the guardian to execute his trust according to law.

§ 906. Guardian and ward — Suit on guardian's bond — Parties.— It is generally provided by law that a guardian shall, before entering upon his duties as such, enter into an obligation to the state or commonwealth in an amount conditioned for the faithful discharge of his duties. This is for the protection of any party injured through misconduct of the guardian, and the obligation is made payable to the state for the want of a better obligee, as it is impossible to conjecture who may become entitled to maintain an action against the guardian for any misconduct or neglect of duty. But a private person has always the right to sue on these bonds notwithstanding they are payable to the state. And when a cause of action accrues against the guardian in his fiduciary capacity, any person entitled to maintain it may sue the guardian and his sureties in the name of the state for the use of himself in order to redress his grievance or maintain his suit.¹

§ 907. Action on guardian's bond — Accrual of cause — Limitation.— As a rule, the statute of limitations will not begin to run against an infant until he becomes authorized by law to sue. And as he could not sooner bring an action against his guardian, it naturally follows that he will not be precluded from doing so until the time shall have elapsed within which infants are permitted under the law to bring an action which, but for their previous disability, would have become barred.² Nor does it begin to run in favor of a guardian until his final settlement or the termination of the guardianship. For until then the guardian is entitled to the custody and control of the property of his ward, and the infant cannot assert his rights.³ But where

¹ Carmichael v. Moore, 88 N. C. 29; McDonald v. People (Colo. App.), 54

² Blake v. Wolfe (Ky.), 49 S. W. Rep.

Pac. Rep. 863; Norman v. Walker, 101

³ McKim v. Mann, 141 Mass. 507, 6

N. C. 24, 7 S. E. Rep. 468; Williams v.

N. E. Rep. 740; Green v. Johnson, 3

McNair, 98 N. C. 336, 4 S. E. Rep. 131,

Gill & J. (Md.) 389.

a female ward marries an adult, the statute will begin to run in favor of the guardian at common law; for the husband then becomes entitled to the personalty of the wife and the use of her realty, and may sue at once to enforce this right.¹ The general rule is, the statute will commence to run against an action on a guardian's bond from the time of the breach and the accrual of the cause of action where the party entitled to complain is *sui juris*.²

§ 908. Guardian's bond — Surety — Extent of liability — Penalty.— When a surety undertakes that the guardian will faithfully perform his duty, and that, in default of such performance, he will pay to the beneficiary in the bond a named sum, this sum, upon a default by the guardian, is the extent and limit of the liability of the surety, as a general rule. If the damages arising from the default be less than the full penalty named in the bond, the surety will, of course, only be liable for the default, because he is not chargeable with the whole penalty upon every slight default of the guardian.³ Cases may arise in which the surety would be liable for a greater amount than the strict letter of the penalty stipulated. Where, therefore, by reason of the fault, neglect or failure of the guardian, he permits a cause of action to enlarge from interest by operation of law when it is his duty to pay it, he may become liable for a greater amount than the face of the bond. Thus, where the penalty named in a guardian's bond was \$6,000, and, because of the default of the guardian, the surety became liable for an amount nearly as much as the penalty named, for which judgment was properly rendered against him, it was held that he was liable for the legal interest which a judgment bears after rendition, though the judgment and interest combined amount to more than the face of the bond, as it is the duty of the surety to pay the liability as soon as it accrues.⁴

§ 909. Sureties on guardian's bond — Extent of liability. The general rule is, the liability of a surety on an official bond

¹ *Finnell v. O'Neal*, 13 Bush (Ky.), 176.

² *State v. Parsons*, 147 Ind. 579, 47 N. E. Rep. 17; *Berkin v. Marsh*, 18 Mont. 152, 44 Pac. Rep. 528.

³ *James v. State* (Ark.), 46 S. W. Rep. 937.

⁴ *James v. State* (Ark.), 46 S. W. Rep. 937. See, too, *Clark v. Wilkinson*, 59 Wis. 543, 18 N. W. Rep. 481.

of any kind must find support in a strict construction of the terms of the instrument of surety. Nothing will be presumed to extend the liability as clearly laid down in the instrument.¹ A surety is not liable on his bond by reason of a change in the law. It is the law in force at the time the instrument is executed that governs, and this law enters into and becomes a part of the contract of suretyship and controls the liability on the bond.² But the law-making power may make changes in the mode of procedure or the rules of evidence without affecting the liability of a surety.³ Sureties on the bond of a guardian which is conditioned that he will in the future faithfully perform his duties are not liable to the ward for any dereliction of duty on the part of the guardian which took place before the bond was executed.⁴ But a surety is liable for the improper application or appropriation by the guardian of moneys in his hands at the time of the execution of the bond, though the money may have come to the hands of the guardian under previous transactions.⁵ And funds coming to the hands of a guardian as proceeds of land ordered sold by the court for the education and maintenance of the ward and otherwise appropriated by the guardian is a diversion, and his sureties will be liable.⁶

§ 910. Surety — General rule of liability.—The general rule of law is, a surety of a guardian is liable on the bond for all acts of omission and commission of which the guardian may be guilty to the prejudice of the estate of the ward and in violation of his fiduciary duty as laid down by law.⁷ A surety on

¹ Gerber v. Ackley, 37 Wis. 43; People v. Pennock, 60 N. Y. 421; Orman v. Pueblo, 8 Colo. 292, 6 Pac. Rep. 931; Tate v. People, 6 Colo. App. 202, 40 Pac. Rep. 471; People v. Cobb (Colo. App.), 51 Pac. Rep. 523; McDonald v. People (Colo. App.), 54 Pac. Rep. 863; People v. Moon, 3 Scam. (Ill.) 123; McDonald v. Denikinger (Colo. App.), 54 Pac. Rep. 863; Madison Co. v. Johnston, 51 Iowa, 152; Bunce v. Bunce, 65 Iowa, 106, 21 N. W. Rep. 205.

² Orman v. Pueblo, 8 Colo. 292, 6 Pac. Rep. 931; State v. Britton, 112

Ind. 214, 1 N. E. Rep. 617; Hudson v. Bishop, 32 Fed. Rep. 519.

³ Winslow v. People, 117 Ill. 52, 7 N. E. Rep. 135.

⁴ Sebastian v. Bryan, 21 Ark. 447.

⁵ McDowell v. Caldwell, 2 McCord (S. C. Eq.), 43; Bockenstead v. Perkins, 73 Iowa, 23, 34 N. W. Rep. 488; Knox v. Kearns, 73 Iowa, 286, 34 N. W. Rep. 861. *Vide*, too, State v. Buck, 63 Ark. 218, 37 S. W. Rep. 881.

⁶ In re Schlee, 65 Mich. 362, 32 N. W. Rep. 717.

⁷ Boyd v. Withers (Ky.), 46 S. W.

the bond of a guardian may, ordinarily, be discharged from liability by procuring a new bond to the satisfaction of the proper authorities and in the manner required by law.¹ But though such a surety may procure a new bond, this will not release him from any liability he may have incurred by reason of his suretyship before the new bond takes effect;² though it will be effective to shield him from liability for any subsequent misconduct of the guardian.³ A surety, in the absence of fraud or collusion on the part of the guardian, is precluded by the order and judgment of the court fixing the liability of the guardian on settlement.⁴ In other words, when the law fixes a liability on the guardian, it attaches with like effect to the amount of the bond to the surety.⁵ And this is true though the surety is not a party to the proceeding.⁶

§ 911. Sureties—Liability where guardian fails to sign bond as principal.—The sureties undertake that their principal, the guardian, will faithfully discharge his official duties, and agree to make good to the party aggrieved any damages sustained by neglect of duty or misconduct on the part of the guardian. Generally speaking, therefore, the guardian should execute the bond as principal before it is delivered. And if the instrument purports to be signed by the guardian as principal, and he should fail to properly execute it, it has been held in a number of cases that there is no liability of the sureties.⁷ “The liability of the surety is conditional to that of the principal. They are bound if he is bound, and not otherwise.

Rep. 18; *Brooks v. Troutman* (Ky.), 47 S. W. Rep. 271; *Hooks v. Evans*, 68 Iowa, 52, 25 N. W. Rep. 925; *Griffin v. Johnson*, 87 Mich. 87; *Bennett v. Overing*, 16 Gray (Mass.), 267; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411; *State v. Bishop*, 24 Md. 310; *Ames v. Williams*, 73 Miss. 772, 20 S. Rep. 877; *Peele v. State*, 118 Ind. 512, 21 N. E. Rep. 288; *Hogshead v. State*, 120 Ind. 827, 22 N. E. Rep. 830.

¹ *Boyd v. Withers* (Ky.), 46 S. W. Rep. 13.

² *Boyd v. Withers* (Ky.), 46 S. W. Rep. 13; *Jones v. Blanton*, 6 Ired. (N. C. Eq.) 115.

³ *Boyd v. Withers* (Ky.), 46 S. W. Rep. 13.

⁴ *Shepard v. Pebbles*, 38 Wis. 373; *Braiden v. Mercer*, 44 Ohio St. 339, 7 N. E. Rep. 155; *Heard v. Lodge*, 20 Pick. (Mass.) 53.

⁵ *Iglehart v. State*, 106 Ind. 251, 6 N. E. Rep. 614; *Commonwealth v. Gracey*, 96 Pa. St. 70; *Neel v. Commonwealth* (Pa.), 7 Atl. Rep. 74.

⁶ *Parr v. State*, 71 Md. 220, 17 Atl. Rep. 1020.

⁷ *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass. 460, 24 N. E. Rep. 404; *Deering v. Moore*, 86 Me. 181, 29 Atl. Rep. 988; *Gay v. Murphy*, 134

The very nature of the contract implies this.”¹ Some courts have held a contrary doctrine, however, though the weight of precedent seems to be against them.² But no doubt if the principal should fail to execute the bond and deliver it to the obligee not executed as to himself, a surety would be liable thereon if he should know of this fact without making objection, or should expressly consent that the instrument be delivered without the signature of the principal.³ So the obligee of a bond may recover of the surety when it has been delivered by the principal and contains nothing upon its face to apprise the obligee that anything further is required to make it effective.⁴ Likewise the sureties on the bond of a married woman will be bound where she joins with them in its execution, though as to her the bond is void by reason of her disability.⁵ It is held in a recent case in Alabama, under a statute in that state, that while the bond of a guardian executed by the sureties alone would not be binding upon them when purporting to be executed by the principal also, the instrument will create a common-law liability against the sureties which might be enforced in a court of law.⁶

§ 912. Surety bound by recital in guardian's bond.—A surety who has executed a bond reciting the fact that his prin-

Mo. 98, 34 S. W. Rep. 1091; *Painter v. Mauldin* (Ala.), 24 S. Rep. 769; *Sacramento v. Dunlap*, 14 Cal. 421; *Green v. Kindy*, 43 Mich. 279, 5 N. W. Rep. 297; *Board of Education v. Sweeney*, 1 S. D. 642, 48 N. W. Rep. 302; *Ferry v. Burchard*, 21 Conn. 597; *Wood v. Washburn*, 2 Pick. (Mass.) 24; *Russell v. Annable*, 109 Mass. 72; *Johnston v. Kimball Tp.*, 39 Mich. 187; *Otto v. Haarla*, 35 Minn. 51, 26 N. W. Rep. 906; *Martin v. Hornsby*, 55 Minn. 187, 56 N. W. Rep. 751.

¹ *Field, J.*, in *Sacramento v. Dunlap*, 14 Cal. 421, 423.

² *State v. Peck*, 53 Me. 284; *Deering v. Moore*, 86 Me. 181, 29 Atl. Rep. 988; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; *Trustees v. Sheik*, 119 Ill. 579. In this last case the Illinois court held that the sureties would be bound, though

the principal did not execute the bond, as the instrument contained his name as principal and purported to be executed by him. See, too, *Leow's Adm'r v. Stocker*, 68 Pa. St. 226; *Williams v. Marshall*, 42 Barb. 524; *Herrick v. Johnson*, 11 Metc. (Mass.) 26.

³ *Adams v. Bean*, 12 Mass. 130; *Bean v. Parker*, 17 Mass. 591; *Wood v. Washburn*, 2 Pick. (Mass.) 24; *Good-year Dental Vulcanite Co. v. Bacon*, 148 Mass. 542, 20 N. E. Rep. 175; *Same Case*, 151 Mass. 460, 24 N. E. Rep. 405.

⁴ *White v. Duggan*, 140 Mass. 18, 2 N. E. Rep. 110. And see *Wild Cat Branch v. Ball*, 45 Ind. 213.

⁵ *Palmer v. Oakley*, 2 Doug. (Mich.) 433.

⁶ *Painter v. Mauldin* (Ala.), 24 S. Rep. 768.

cipal has been appointed guardian will not be permitted to show that he was not in fact such guardian, for by executing the obligation reciting the appointment he recognizes the existence of the guardianship.¹

§ 913. Bond of guardian — Action against sureties — How brought.— As official bonds are usually drawn up and executed in the name of the state, actions thereon are generally brought by the party aggrieved in the name of the state or the people, as the case may be, for the use of himself. The bond, while payable nominally to the state, is intended for the protection of any person who may be damnified by any misconduct of the guardian, and as it is impossible to contemplate in advance who may be thus injured, or how many may become entitled to sue, the bond is made to run in the name of the state for convenience, and any one having a cause of action against the sureties may set the machinery of the courts in motion upon the bond by bringing the cause in the name of the state for his use and benefit. The state is then, of course, the nominal party merely, and the person aggrieved the real party.²

§ 914. Sale of property of ward by guardian — Irregularity — Effect of confirmation.— A sale of the property of a ward by the guardian is practically a sale by the court having jurisdiction in such matters. The guardian acts as the instrument of the court in carrying the same into effect. This being true, it is generally held that an irregular sale, when duly ratified and confirmed by the court, cures all defects. It is true that, before the confirmation, any party in interest might interpose an objection on account of the irregularity and have another sale ordered. But, in the event no such objection is made, and there is no material injury to the interests of the ward shown by reason of the irregularity, the court may waive this and confirm the sale, and such confirmation will have the effect of making the sale as valid and effective as though every requirement of law had been strictly and faithfully carried out.³ Neglect of the guardian making the sale

¹ *Fridge v. State*, 3 Gill & J. (Md.) 54 Pac. Rep. 863; *Winslow v. People*, 103: *Ryan v. People*, 165 Ill. 143, 46 117 Ill. 52, 7 N. E. Rep. 135. N. E. Rep. 206.

³ *Bennett v. Owen*, 13 Ark. 177;

² *McDonald v. People* (Colo. App.), *Harris v. Brown* (N. C.), 31 S. E. Rep.

to have the land appraised in a certain manner will be cured by confirmation.¹ So, if the order of the court directing the sale should misdescribe the land to be sold, this will be cured by confirmation where it referred to the petition for the sale and the description therein was correct.² The omission to give any notice of the sale is also but an irregularity.³ Likewise is a failure to advertise the sale as the law directs.⁴ And a sale made by a guardian in private, instead of at public auction, as required by law, does not vitiate it, and it becomes effective upon confirmation.

§ 915. Effect of confirmation of sale by guardian upon purchaser.—Where one purchases land at a sale by a guardian duly ordered by the court having jurisdiction in such matters, and the same is approved by the court, the effect of the confirmation is to vest title, by operation of law, in the purchaser. It is not the sale by the guardian that passes the interest of the infant, but the order of the court approving and confirming it.⁵ This being true, the fact that there may be irregularities or defects in the deed executed by the guardian under order of the court will not in any way weaken or prejudice the title vested in the purchaser by virtue of the order of confirmation.⁷ But in order that confirmation render a sale effective, it must be irregular or voidable only; the court cannot instill vitality into a sale which is void, for this is a nullity and there is nothing to confirm.⁸

§ 916. Sale of property of ward under direction of court. The courts having jurisdiction to order the sale of land of an infant for educational or other purposes are usually held to be

877; *Montgomery v. Johnson*, 31 Ark. 74; *Thorn v. Ingram*, 25 Ark. 52; *Lumpkins v. Johnson*, 61 Ark. 80, 32 S. W. Rep. 65; *Elaison v. Bronnenburg*, 147 Ind. 248, 46 N. E. Rep. 582; *Clopper v. Hutcheson* (Tex. Civ. App.), 40 S. W. Rep. 604.

¹ *Bell v. Green*, 38 Ark. 78, 80; *Apel v. Kelsey*, 47 Ark. 413, 2 S. W. Rep. 102.

² *Montgomery v. Johnson*, 31 Ark. 74.

³ *Apel v. Kelsey*, 47 Ark. 413, 2 S.

W. Rep. 102; *Beidler v. Friedell*, 44 Ark. 411, 414.

⁴ *Apel v. Kelsey*, 47 Ark. 413, 2 S. W. Rep. 102.

⁵ *Fleming v. Johnson*, 26 Ark. 421.

⁶ *Sturdy v. Jacoway*, 19 Ark. 499.

⁷ *Sturdy v. Jacoway*, 19 Ark. 499.

⁸ *Jenness v. Smith*, 58 Mich. 290, 25 N. W. Rep. 191; *O'Connor v. Vineyard* (Tex. Civ. App.), 43 S. W. Rep. 55; *Wells v. Steckleberg*, 50 Neb. 670, 70 N. W. Rep. 242. *Vide*, too, *Hicks v. Blakeman*, 74 Miss. 459, 21 S. Rep. 7.

superior courts of record, and the orders of such courts directing a sale of the property of a minor will be presumed to have been made upon a proper showing. The law lays down certain requirements which these courts must observe in directing the sale of property of infants, but it presumes, at the same time, in the absence of an affirmative showing to the contrary, that these courts have acted upon proper authority and in accordance with law.¹

§ 917. Authority of courts to order the sale of land or other property of ward.—Jurisdiction in the matter of the property of all infants entitled to a guardian is usually lodged in courts of probate or other like courts. Sometimes this authority is found in chancery. Courts having such jurisdiction are given authority, upon proper application and showing, to order the sale of any of the property of the ward for his support and education. The guardian has no authority whatever to make the sale without the authority of the court, and the ward can make none because he is an infant. The sale of the property of the ward therefore rests in the discretion and authority of those courts whose peculiar jurisdiction gives them supervision and control of his estate.² The authority lodged in these courts to order a sale of property must be found in the letter of the statute. None will be presumed which is not expressly conferred.³ The authority to order the sale of the realty, however, includes the power to decree the sale of the homestead right of the infant to which he succeeds upon the death of the parent.⁴

§ 918. Confirmation of sale — Collateral attack.—An order of court confirming a sale of property belonging to an infant by his guardian cannot be attacked in a collateral proceeding where jurisdiction exists.⁵ The remedy is by appeal if the court

¹ Redmond v. Anderson, 18 Ark. 449; Currie v. Franklin, 51 Ark. 338, 11 S. W. Rep. 477.

² Hoyt v. Hammekin, 14 How. (U.S.) 346; Phelps v. Buck, 40 Ark. 219; Shumard v. Phillips, 53 Ark. 37, 13 S. W. Rep. 510; Bates v. Dunham, 58 Iowa, 308, 12 N. W. Rep. 309; Antiondas v. Walling, 3 Green Ch. 42.

³ Bent v. Maxwell L. G. & Ry. Co., 3 N. M. 158, 3 Pac. Rep. 721.

⁴ Merrill v. Harris, 65 Ark. 355, 46 S. W. Rep. 538; In re Hamilton's Estate, 120 Cal. 421, 52 Pac. Rep. 708.

⁵ Emery v. Vroman, 19 Wis. 689; Montgomery v. Johnson, 31 Ark. 74; Bunce v. Bunce, 59 Iowa, 533, 13 N. W. Rep. 705; Davis v. Hudson, 29

has made an order which is improper.¹ The writ of *certiorari* is not effective for the purpose unless it appears of record that the court has exceeded its jurisdiction.² But where the court orders a sale of the realty of the ward, it is necessary that the land to be sold be described with at least reasonable accuracy. And unless the description of the realty be such as to provide for ascertainment of the property sold, the transaction would be vulnerable to collateral attack, for neither the order nor the confirmation of sale can be effective when the property sold is not definitely described, for an indefinite description is no designation.³

§ 919. Authority of father to sell land of his infant child. While the father is the natural guardian of his child for many purposes, yet he has, as a rule, no authority, by reason of this relation to his child, to make a valid sale of land or other property of his infant. Further, the courts have no authority to authorize a father, who has not taken out letters of guardianship as required by statute, to make any sale of property belonging to his child. And a sale by the father, either under an order of court or without it, when he has not been appointed guardian, will convey no title.⁴

§ 920. Sale of land by guardian — Necessity for confirmation.— The mere sale of land by a guardian does not pass the estate of his ward in the property attempted to be sold. These sales are by order of the court and are judicial sales. They must, generally speaking, be authorized by the court, and the guardian becomes an instrument of the court, in a sense, for the purpose of effecting the sale. He is the servant of the court in making the sale, very much like a commissioner appointed in ordinary cases of foreclosure where a sale of land is ordered. The making of the sale, even under the strict orders and instructions of the court, is only a step towards the con-

Minn. 27, 11 N. W. Rep. 136; Succession of Keller, 89 La. Ann. 579, 2 S. Rep. 553; Daughtry v. Thweatt, 105 Ala. 615, 16 S. Rep. 920; Halliman v. Carroll's Adm'rs, 27 Tex. 23.

¹ Furnish v. Austin (Ky.), 7 S. W. Rep. 399; Phelps v. Buck, 40 Ark. 219.

² Phelps v. Buck, 40 Ark. 219.

³ Hill v. Wall, 66 Cal. 130, 4 Pac. Rep. 1139. See also Frazier v. Steenrod, 7 Iowa, 339.

⁴ Hoyt v. Hammekin, 14 How. (U. S.) 346; Gynn v. McCauley, 32 Ark. 97; Shanks v. Seamonds, 24 Iowa, 181.

summation thereof. The court, for any good reason, may repudiate the action of the guardian and order another sale. If the sale be confirmed, however, it will usually be deemed valid. But, until confirmed and thus acted upon by the court, no title or interest passes.¹ This being true, if a person purchase land of a ward at a sale by his guardian which is never approved or confirmed by the proper tribunal, he will be liable to the estate of the ward for the use and occupation of the realty, just as though he had possessed it in the first instance without any color of right.² And a deed by a guardian which is executed in furtherance of a sale which has not been confirmed by the proper tribunal does not confer any title.³

§ 921. Sale of land by guardian — Purchase-money — Must be paid in lawful money of the United States.— When a guardian makes a sale of land or other property of his ward, it is his duty to require payment of the purchase price in cash, unless the sale be authorized on a credit, in which case he must act in good faith in taking proper security. But he must take some security besides himself; for, to accept himself as security, would violate the well-established rule that he cannot deal with the property of his ward in a manner which might result in injury to his estate. If, therefore, in violation of his duty, the guardian should accept his own obligation for the purchase-money, this would be a breach of trust on his part.⁴ Further than this, the purchaser would be in no better attitude and would have to account to the ward for the price bid.⁵ The purchase-money should be paid to the guardian, not paid into court. He is the proper custodian of the funds of his ward.⁶

§ 922. Sale of ward's land — Judicial sale.— The sale of the property of a guardian under proper and legal orders of a court having jurisdiction is a judicial sale, and the grantor and

¹ Guynn v. McCauley, 32 Ark. 97; Reid v. Hart, 45 Ark. 41; Ried v. Morton, 119 Ill. 118, 6 N. E. Rep. 414; Greer v. Anderson, 62 Ark. 213, 35 S. W. Rep. 215; Penn v. Heisey, 19 Ill. 295; Harrison v. Ilgner, 74 Tex. 86, 11 S. W. Rep. 1054.

² Ambleton v. Dyer, 53 Ark. 224, 13 S. W. Rep. 926.

³ Titman v. Riker, 43 N. J. Eq. 122, 10 Atl. Rep. 397; Alexander v. Hardin, 54 Ark. 480, 16 S. W. Rep. 264.

⁴ Ambleton v. Dyer, 53 Ark. 224, 13 S. W. Rep. 926.

⁵ Ambleton v. Dyer, 53 Ark. 224, 13 S. W. Rep. 926.

⁶ State v. Steele, 21 Ind. 207.

grantee are governed by the rules of law controlling the rights of persons acquired at judicial sales.¹ Under such sales thus made by the court the doctrine of *caveat emptor* is usually imposed upon the purchaser.²

§ 923. Regular sale of land by guardian divests the infant of title.—The sale of land belonging to an infant by his guardian, when made in accordance with law, being confirmed by the court having jurisdiction in such cases, completely divests the infant of all title to the land sold and vests the same in the purchaser.³ But it only divests the title which the ward has at the time the order is made; it does not convey any interest which may come to the ward subsequently or from a source other than the ancestor.⁴

§ 924. Sale by guardian — Good faith required.—It is very clear that a guardian should exercise the best of faith in making a sale of property belonging to his ward. The law does not tolerate any fraud on his part or on the part of the purchaser. He must make a *bona fide* effort to realize all that can be had. If, therefore, a guardian should conspire with third parties to suppress bidding, or do any other act to the prejudice of the ward, the sale would not be valid, and confirmation would be refused whenever such facts are made to appear to the court.⁵ But, though the sale might be void as to the guardian, it may be good as to an innocent purchaser. So where A., as guardian, made a sale of the property of his ward, and colluded with B. to become purchaser, who, some time after the purchase, conveyed the property bought to A., and C., in good faith and without any notice of irregularity, bought the same from A., it was held that C. took a good title.⁶ There is a want of harmony among the authorities, however, on this point. Statutes governing such sales usually condemn them as void. The courts find the difficulty in construing the word "void." Some contend for a strict construction of the term, which re-

¹ Guynn v. McCauley, 82 Ark. 97.

² Black v. Walton, 82 Ark. 321.

³ Morrison v. Nellis, 115 Pa. St. 41,
7 Atl. Rep. 768; Gibson v. Roll, 27
Ill. 88.

⁴ Erwin v. Garner, 108 Ind. 488, 10
N. E. Rep. 417.

⁵ Devine v. Harkness, 117 Ill. 145,
7 N. E. Rep. 52.

⁶ White v. Iselin, 26 Minn. 487, 5 N.
W. Rep. 359.

sults in the doctrine that no title whatever passes by the transaction. A number of cases holding both ways are given in a note.¹ No doubt, in all such cases, the guardian would be liable to the ward for the difference in the amount for which the property sold and that for which it should have sold; and it would seem, upon principle, that, as the estate of the infant would thus get precisely the same amount to which it would have been entitled had the sale been made in good faith, the law would be satisfied. And if this is correct, the innocent purchaser would also be protected, which is itself a consideration of material importance.²

§ 925. Petition for sale of property must be in county where ward resides.—As a general rule, only the courts in the county where the ward resides or the guardianship is pending have jurisdiction to order the sale of any property of the ward.³ This is true though it is sought to sell land in a county other than that where the guardian was appointed.⁴ The petition for the sale should affirmatively show the county in which the guardianship is pending, to the end that the jurisdiction may appear in the proceedings.⁵ Doubtless, however, the omission to show this would not invalidate an order of sale where the application was made in fact to the court having jurisdiction. The petition must show facts which authorize the exercise of jurisdiction, but it need not state every fact which would serve this purpose. And if it state any sufficient fact, the allegation of other facts which are not sufficient will not affect the jurisdiction.⁶

§ 926. Notice of sale of ward's property.—Statutes usually require certain notice to be given by a guardian before proceeding to sell any of the property of the ward. This, of course, is for the purpose of making the same known, to the end that there may be competition in bidding, and a resulting

¹ Loyd v. Malone, 23 Ill. 43; Terrill v. Auchauer, 14 Ohio St. 60; Hoffman v. Harrington, 28 Mich. 90; Forbes v. Hasley, 26 N. Y. 53; Boyd v. Blankman, 29 Cal. 19. And an intelligent discussion of the law will be found in the case of White v. Iselin, 26 Minn. 487, 5 N. W. Rep. 359.

² See Hunter v. Lawrence's Adm'r, 11 Gratt. (Va.) 111.

³ Loyd v. Malone, 23 Ill. 43.

⁴ Loyd v. Malone, 23 Ill. 43.

⁵ Loyd v. Malone, 23 Ill. 43.

⁶ Walker v. Goldsmith, 14 Oreg. 125, 12 Pac. Rep. 537.

benefit from better prices thereby stimulated. It would be difficult to give in detail all the local requirements for notice of sales by guardian, as these transactions are governed, as a rule, by local laws, which must be followed in order to effect a valid sale.¹ The guardian is usually required to specify in the notice the time, place and terms of sale, for the information of any who may contemplate making a purchase. If realty is to be sold, the notice should contain a correct description of the land. And if the court having authority to order and confirm sales by a guardian be a superior court of record, which is usually the case, it will be presumed, in the absence of a contrary showing, that proper notice of a sale was given.² It is not usual to serve notice by summons on the ward in a proceeding to sell his land. This is an *ex parte* proceeding by the guardian, and the positive provisions of law which the guardian must follow are considered a sufficient safeguard for the ward.³

§ 927. Authority of a state to prescribe rules of property governing the estate of an infant.—Every state has dominion over all property within its bounds, as a general rule, to the extent that it may prescribe the status and rules and regulations concerning the disposition and administration of property belonging to an infant, lunatic, spendthrift, etc.⁴ Within this is embraced the mode of appointment of a guardian; his qualifications; his duties and manner in which they must be performed, as well as the management, investment, control and disposition of the estate in general.⁵

§ 928. Adverse possession — Statute of limitations.—The possession of the property of the ward by his guardian is amicable in its inception, and as it is proper in view of the authority and relation of the guardian, there is no presumption that this possession becomes adverse so as to bar the right of the ward by limitation.⁶ The guardian is a trustee of an express

¹ See, in a general way, *In re Schlee*, 65 Mich. 362, 32 N. W. Rep. 717; *Ingram v. Laroussini*, 50 La. Ann. 69; 23 S. Rep. 498; *Hamiel v. Donnelly*, 75 Iowa, 93, 39 N. W. Rep. 210; *Pursley v. Hays*, 22 Iowa, 11.

² *Kelley v. Morrell*, 29 Fed. Rep. 736; *Schaale v. Wasey*, 70 Mich. 414, 38 N. W. Rep. 317.

³ *Fitzgibbon v. Lake*, 29 Ill. 165.

⁴ *Hoyt v. Sprague*, 103 U. S. 613.

⁵ *Hoyt v. Sprague*, 103 U. S. 613; *Lobrano v. Nelligan*, 9 Wall. 295.

⁶ *Weeks v. Weeks*, 5 Ired. Eq. (N. C. Eq.) 111; *Halliburton v. Fletcher*, 22 Ark. 453.

trust, and the rule in such cases is, the statute will not begin to run against the *cestui que trust* until he has had actual notice of the adverse claim and is capable in law of asserting his rights in the courts.¹ A guardian is not entitled to credit in his settlement for a claim due himself which had become barred by the statute of limitations before he entered upon the discharge of his duties.² And he cannot plead the statute of limitations against his ward in an action for a failure to perform his official duty until he has filed his final settlement.³

§ 929. Judgment against guardian — Effect.—When a cause of action arises against a guardian in his representative capacity, and a judgment is recovered upon such cause of action in an action against him as guardian, this judgment will bind the property of the ward in the hands or control of the guardian, but will not bind either the ward or guardian personally.⁴

§ 930. Homestead of infants — Duty of guardian.—Where the law gives to infant children a homestead interest in the realty of their ancestor, this is part of the property which the guardian, upon entering on the discharge of his duties as such, should take charge of and use to such advantage as will probably bring in the best income.⁵ It is usually required that a homestead be occupied, but the possession in a third person as tenant of the guardian will be a sufficient occupancy, as such holding is practically in right of the infant through his guardian.⁶

§ 931. An administrator has no authority as guardian.—“Administrators are merely legal trustees of the creditors and heirs of the intestate. They are not the guardians of the decedent’s children, and cannot incur a fiduciary liability on that account.”⁷ By virtue of the trust and legal duties of an adminis-

¹ McGaughey v. Brown, 46 Ark. 25; Kane v. Bloodgood, 7 Johns. Ch. 90; Ferrill v. Murry, 4 Yerg. (Tenn.) 104, 106; Jones v. Jones, 28 Ark. 19; Woodard v. Jagers, 48 Ark. 248, 2 S. W. Rep. 851; Brinkley v. Willis, 22 Ark. 1.

² Bondie v. Bourassa, 46 Mich. 321, 9 N. W. Rep. 433.

³ Nunnery v. Day, 64 Miss. 457, 1 S. Rep. 636; Jordan v. McKenzie, 30 Miss. 32. And see Blake v. Wolfe (Ky.), 50 S. W. Rep. 2.

⁴ Howard v. Cassels (Ga.), 81 S. E. Rep. 562.

⁵ Booth v. Goodwin, 29 Ark. 633.

⁶ Booth v. Goodwin, 29 Ark. 633.

⁷ Menifee v. Ball, 7 Ark. 520, 523.

trator, he has no right to the custody of the children of the intestate, nor is he under any duty to look after their support or welfare.¹ The administrator is accountable, as such, for any property coming into his hands by virtue of his office which is not needed for the payment of legacies or debts of the intestate; but he has no authority to pay this over to the infant child, nor incur any liability for such child in the management, control or disposition of the property coming to his hands. This he should pay over, in obedience to the order and judgment of the proper court, to the guardian of the children authorized by law to receive property belonging to them.²

§ 932. Inventory of property.—Statutes generally provide that a guardian, within a certain time after his appointment, must lodge with the court having jurisdiction over him a complete and perfect inventory of all the property of his ward as far as can be ascertained. This inventory is for the purpose, among others, of apprising the court of the amount, kind and quality of the assets of the ward, and serves as a guide for the court in making orders for the sale or disposition of the property for educational or other lawful purposes. It is required, therefore, that the inventory be sufficiently full and complete to afford a convenient designation and identification of the trust property.³ If there should be a clerical error or an honest mistake in the inventory submitted by a guardian, he should be permitted to correct it.⁴

§ 933. Right of ward to disaffirm act of guardian.—It is very clear that when the guardian does an unlawful act, or otherwise acts unlawfully in the discharge of his trust duties, the ward, upon arriving at age, may repudiate the transaction and assert his rights as though such unlawful act had not been committed. In cases of the ratification or repudiation of an act by an infant upon attaining majority, the ward must complain of the wrong at the hands of his guardian within a reasonable time after becoming *sui juris*, if no express time is provided by statute.⁵ When the statute names a time within

¹ Meniffee v. Ball, 7 Ark. 520, 523.

² Meniffee v. Ball, 7 Ark. 520, 523.

³ Wilson v. Hastings, 66 Cal. 243, 5 Pac. Rep. 217.

⁴ Martin v. Sheridan, 46 Mich. 93, 8 N. W. Rep. 722.

⁵ Braze v. Scofield, 2 Wash. 209, 8 Pac. Rep. 265.

which he may disaffirm an act of his guardian, no time short of the full period thus allowed will be held unreasonable.¹

§ 934. Compensation of guardians.—The law does not require a guardian to discharge his duties and incur the incident responsibilities and liabilities without pay. They are therefore always entitled to compensation when they have discharged their duty faithfully in the manner required by law.² This compensation is often fixed by statute, and is usually a per centum of the property administered. But a guardian who has abused his trust, neglected his duty, wasted the estate of his ward, or otherwise acted illegally, will not be allowed any compensation, for such conduct precludes him from any right to require this.³ This is because guardians are always held to a strict accountability for all property which comes into their hands by reason of their relation to the ward, and the law does not deem them entitled to compensation when they have culpably abused the trust and confidence reposed in them. When no compensation is fixed by statute, the guardian will be entitled to reasonable pay, and this may be ascertained from the nature and amount of the services rendered by the guardian and the ability of the estate which he administers.⁴ A guardian is sometimes entitled to extra compensation for such items as attorney's fees and like expenses necessary to the protection and preservation of the estate of the ward. This is never allowed, however, unless the necessity therefor be clear;⁵ and not then, until the guardian files his settlement showing the facts.⁶

§ 935. Extraterritorial effect of appointment.—The general rule is, the appointment of a guardian, however regular

¹ *McNeil v. First Congregational Soc.*, 66 Cal. 105, 4 Pac. Rep. 1096.

² *Ritchie v. Forrest*, 2 Pet. 243; *Appeal of Fish* (Pa.), 7 Atl. Rep. 222; *Reed v. Ryburn*, 23 Ark. 47; *Knowlton v. Bradley*, 17 N. H. 458; *Brewer v. Ernest*, 81 Ala. 435, 2 S. Rep. 84; *Appeal of Williams*, 119 Pa. St. 87, 12 Atl. Rep. 826; *Spies v. Stikes*, 112 Ala. 584, 20 S. Rep. 959; *In re Wardworth's Estate*, 6 N. Y. S. 932.

³ *Appeal of Fish* (Pa.), 7 Atl. Rep. 222; *Reed v. Ryburn*, 23 Ark. 47; *Top-*

ping v. Windley, 99 N. C. 4, 5 S. E. Rep. 14; *In re Wordell* (N. J. Eq.), 12 Atl. Rep. 133; *In re Pierce's Estate*, 68 Vt. 639, 35 Atl. Rep. 546; *Appeal of Albert*, 128 Pa. St. 613, 18 Atl. Rep. 347; *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. Rep. 87.

⁴ *Gott v. Culp*, 45 Wis. 265, 7 N. W. Rep. 767.

⁵ *Stanley v. Deihough*, 50 Ark. 201, 6 S. W. Rep. 896; *Pyatt v. Pyatt*, 44 N. J. Eq. 491, 15 Atl. Rep. 421.

⁶ *Smith v. Philbrick*, 2 N. H. 395.

and formal it may be, has no force or effect beyond the state in which the court making the appointment is located.¹

§ 936. Guardian cannot delegate his authority.—A guardian has no right or power to delegate to another the authority conferred upon him by law. To permit him to do this would be little less than to authorize him to appoint a guardian,—a thing which can be done, as a rule, only after full compliance with law in the matter of petitioning, giving bond, etc. The appointment is a judicial act of a superior court of record or testamentary disposition by the father, and unless a person has been thus authorized he has no authority to act in the capacity of guardian.²

§ 937. Burial expenses — Liability of estate of ward.—As a general rule the estate of an infant is liable for the proper and necessary burial expenses according to the condition in life and ability of the ward. And a guardian furnishing same is entitled to be reimbursed for such proper expenses when not extravagant or unnecessary.³ The guardian for this purpose may even invade the *corpus* of the estate when it is necessary to do so.⁴

§ 938. Surcharging guardian's account — Jurisdiction.—As a rule courts having jurisdiction over the administration of the estates of infants have no jurisdiction to surcharge and falsify for fraud, actual or constructive, the accounts and settlements of a guardian after the same have been approved. This power is lodged in courts of chancery, which tribunals have a peculiar jurisdiction in all matters pertaining to fraud and mistake.⁵

§ 939. Indebtedness of guardian to estate of ward — Liability.—If a guardian be indebted to the estate over which he assumes trust duties, he will be regarded in law as having

¹ Kraft v. Wickley, 4 Gill & J. (Md.) 332. Hendrickson v. Mayton (Tenn.), 42 S. W. Rep. 485. And see Gilleylen v.

² Mellish v. De Costa, 2 Atk. 14. McKinney, 74 Miss. 764, 21 S. Rep.

³ Dixon v. Hosick (Ky.), 41 S. W. Rep. 282. 918; Campbell v. Clark, 63 Ark. 450, 39 S. W. Rep. 262; Allen v. Conklin

⁴ Hobbs v. Harlan, 10 Lea (Tenn.), 268. (Mich.), 70 N. W. Rep. 339; O'Connor v. O'Connor (R. I.), 37 Atl. Rep. 634.

⁵ Roy v. Giles, 4 Lea (Tenn.), 535;

collected the debt. That is, as he cannot sue himself, and assumes to administer a trust which forbids him to do this, and which at the same time requires him to collect and account for the debt he owes, he "must, in legal contemplation, be considered to have paid the debt to himself, and to continuously hold the money so long as his representative character continues; and his sureties, as well as himself, are therefore liable for it."¹ Such indebtedness would become assets of the estate of the infant, for which the guardian and his sureties must account, just as for any other assets.²

§ 940. Effect of release of guardian by ward.—A guardian occupies a confidential and trust relation to his ward. He has a sacred duty to perform in administering this trust. His honor and this legal duty should prompt him to the utmost fairness in all transactions concerning the property or other rights of his ward. He is in a position to use his relation to his own advantage and the disadvantage of his ward. For these and other reasons it is clear beyond doubt that any release executed by the ward to the guardian during infancy could be repudiated by the ward upon attaining majority.³ Nor is the influence of the guardian presumed to cease instantly when the ward arrives at age. The general rule, therefore, is, the guardian cannot screen himself from his official duty in whole or in part, nor bind his ward, by taking a release from him soon after becoming *sui juris*. True it is, if the settlement should be fair and in good faith, and no advantage be taken of the ward, a release would be binding if executed after attaining the age of majority. But if there has been any unfairness or advantage taken by the guardian, the release, though executed after attaining lawful age, will not be binding upon the adult child.⁴

¹ Sargent v. Wallis, 67 Tex. 483, 3 S. W. Rep. 721; Stevens v. Gaylord, 11 Mass. 263; Avery v. Avery, 49 Ala. 193; Winship v. Bass, 12 Mass. 199.

² Sargent v. Wallis, 67 Tex. 483, 3 S. W. Rep. 721.

³ Fridge v. State to use of Kirk, 3 Gill & J. (Md.) 103.

⁴ Waller v. Armestead's Adm'r, 2 Leigh (Va.), 11; Lewis v. Browning, 111 Pa. St. 493, 4 Atl. Rep. 842; Korn

v. Executor of Becker, 40 N. J. Eq. 408, 4 Atl. Rep. 434; Durell v. Gibson (Me.), 9 Atl. Rep. 353; Luke's Appeal, 7 Watts & S. (Pa.) 48; Barnes v. Ward, Bush. (N. C. Eq.) 93; Carter v. Tice, 120 Ill. 277, 11 N. E. Rep. 529; Peadro v. Carriker, 168 Ill. 570, 48 N. E. Rep. 102; McConkey v. Cockey, 69 Md. 286, 14 Atl. Rep. 465; Davis v. Hagler, 40 Kan. 187, 19 Pac. Rep. 628; Poullain v. Poullain, 76 Ga. 420, 4 S. E. Rep. 92;

But claims by the ward for fraud of the guardian should be made in a reasonable time. Generally, the courts will not lend a willing ear to a plea by a ward that his guardian in settling with him has dealt unfairly, when made years after the transaction or the death of the guardian. Only the prompt and diligent will be entitled to relief.¹ Four months after attaining majority has been held to be reasonable, however.² But four years is not.³

§ 941. Misappropriation of property by guardian — Right to follow the property into the hands of third persons.— Where the guardian misappropriates the property of his ward, the latter will have the right, upon attaining majority, to follow the trust property into the hands of a third party so long as the identity of the property remains. As well expressed in the language of an eminent writer: "No change in the form of the trust property effected by the trustee will impede the rights of the beneficial owner to reach it, and compel its transfer, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it can no longer be specifically separated. If the trust property has been transferred to a *bona fide* purchaser for value, without notice, or has lost its identity, the beneficial owner must, and, under other circumstances, he may, resort to the personal liability of the wrong-doing trustee."⁴ This right of the ward, being the older, is regarded as superior to the rights of creditors of the stranger into whose hands the trust property improperly comes.⁵ Of course if the guardian should improperly mingle the trust property with his own so that its identity is lost, he will be liable to the ward for the value of the property thus converted with legal interest from the time of the conversion.⁶ But if the

Ferguson v. Lowry, 54 Ala. 510; Gillette v. Wiley, 126 Ill. 310, 19 N. E. Rep. 287; Fish v. Miller, Hoff. Ch. 267. And see Maulfair's Appeal, 110 Pa. St. 402, 2 Atl. Rep. 530.

¹ Morganstern v. Schuster, 66 Md. 250, 7 Atl. Rep. 687; Scott v. Free-land, 7 S. & M. (Miss.) 409; Kelly v. McQuinn, 42 W. Va. 774, 26 S. E. Rep. 517; Chorpenning's Appeal, 32 Pa. St. 315; Hart v. Stribling, 25 Fla. 433, 6 S. E. Rep. 455.

² Stanley's Appeal, 8 Pa. St. 431. See, too, McConkey v. Cockey, 69 Md. 286, 14 Atl. Rep. 465.

³ Aaron v. Mendel, 78 Ky. 427.

⁴ 2 Pom. Eq. Jur., § 1058; Robinson v. Woodward (Ky.), 48 S. W. Rep. 1082.

⁵ Robinson v. Woodward (Ky.), 48 S. W. Rep. 1082; Andrew v. Hurt's Adm'r (Ky.), 29 S. W. Rep. 304.

⁶ Forbes v. Ward (Mass.), 52 N. E. Rep. 447; Lathrop v. Bampton, 31 Cal. 17, 25.

ward, or *cestui que trust* can identify the trust property either in its original or a substituted form, he may recover the property itself, if he prefers to do so, rather than hold his guardian liable for its value.¹ If the property is transferred to a third person who has notice, the ward may reach it in his hands.²

§ 942. When the authority of a guardian ends.—As an infant becomes *sui juris* upon attaining a certain age, and as he is then supposed to be as capable of taking care of his own property and managing his own affairs as well as any other person might for him, it naturally follows that the authority of a guardian, as a general rule, ceases the instant the ward attains majority.³ The guardianship ends also upon the death of the ward, and he must then account to the legal representatives of the ward under the direction of the proper court.⁴ It also ends upon the marriage of a female ward.⁵ But from this it does not follow that no liability which a guardian incurs while acting in this capacity can be enforced after the ward attains majority. There are many ways in which this liability may be continued. Upon any contract which the guardian might make by reason of which he would become personally liable, he would be so liable until the liability is barred regardless of the age of his ward, for this has nothing to do with such liability. Further, the court to which he must account may and should retain jurisdiction and authority over him until he has made proper settlement, for these duties he cannot ignore or neglect because his ward has attained the age at which infancy ceases.⁶

¹ Lathrop v. Bampton, 81 Cal. 17.

² Hill v. McIntire, 39 N. H. 410; McDuffie v. McIntyre, 11 S. C. 551.

³ In re Kincaid's Estate, 120 Cal. 203, 52 Pac. Rep. 492; Curtis v. Devoe, 121 Cal. 468, 53 Pac. Rep. 936; Overton v. Beavers, 19 Ark. 623.

⁴ Alford v. Halbert, 74 Tex. 346, 12

S. W. Rep. 75; Price v. Peterson, 38 Ark. 494; McKim v. Mann, 141 Mass. 507, 6 N. E. Rep. 740.

⁵ Price v. Peterson, 38 Ark. 494.

⁶ Foster v. Fuller, 6 Mass. 58; Overton v. Beavers, 19 Ark. 623, 628; Price v. Peterson, 38 Ark. 494; Stinson v. Leary, 69 Wis. 269, 34 N. W. Rep. 63.

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